TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 170

HUGHES BROS. TIMBER COMPANY, PETITIONER,

vs.

STATE OF MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JULY 16, 1925

CERTIORARI GRANTED OCTOBER 12, 1925

(31,327)

Be careful of

(31,327)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 604

HUGHES BROS. TIMBER COMPANY, PETITIONER,

vs.

STATE OF MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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24445

STATE OF MINNESOTA

IN THE

SUPREME COURT

STATE OF MINNESOTA,

Plaintiff-Respondent,

vs.

HUGHES BROS. TIMBER COMPANY,
a co-partnership,

Defendant-Appellant.

RECORD

CERTIFICATE OF COUNTY TREASURER OF COOK COUNTY, OF PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1922

(To be Attached to Sheriff's List of Uncollected Personal Property Taxes)

STATE OF MINNESOTA,)
)ss.
County of Cook)

I, Chas. Seglem, County Treasurer of Cook County, State of Minnesota, do hereby certify that the foregoing and attached list is the list of uncollected personal property taxes

made by the Sheriff of said County to the Clerk of the District Court of said County, and by said Clerk delivered and filed in my office. That I have compared said list with the tax duplicates in my office and find that all personal property taxes for the year 1922, reported by me to said Clerk, which are not
4 included in said list of said Sheriff above referred to and hereto attached, have been received by me as such Treasurer and paid into my office by said Sheriff or otherwise, except the following items, which have not been paid into my office nor received by me, to-wit:

Name of Person Assessed, Hughes Bros. Timber Co.; Township or District, Hovland; Tax, $2,654.09; Penalty, Fees and Costs, $265.41; Total Tax and Costs, $2,919.50.

Given under my hand, this 5th day of April, 1923.

5

CHAS. SEGLEM, County Treasurer,
Of Cook County, Minnesota.

Filed in my office this 5th day of April, 1923.
MATT JOHNSON, Clerk of District Court
Cook County, Minn.

State of Minnesota) District Court,
) ss.
6 County of Cook) 11th Judicial District

I, Matt Johnson, Clerk of the above mentioned Court, do hereby certify that I have carefully compared the foregoing copy of Certificate of County Treasurer of Delinquent Personal Property Tax for the year 1922, as to Hughes Bros. Timber Co., with the original on file in this office, and that

the same is a true and correct copy of said original and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said District Court at Grand Marais on this 6th day of May A. D. 1924. 7

MATT JOHNSON,
Clerk of District Court,
Cook County, Minnesota.

State of Minnesota
County of Cook

District Court
11th Judicial District

STATE OF MINNESOTA,

Plaintiff, 8

vs.

HUGHES BROS. TIMBER COMPANY,
a co-partnership,

Defendant.

ANSWER

In the Matter of the Personal Property Taxes levied against Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota.

9

Comes now HUGHES BROS. TIMBER COMPANY, a co-partnership, consisting of Francis J. Dacey, D. J. Arpin, Thomas H. Hughes and George J. Hughes, and answers the certified list of delinquent personal property taxes filed in the office of the Clerk of the above District Court in April 1923, and answers the claim and demand brought against it for the taxes stated in the list so filed and herein sets forth its

defense and objections to said taxes and for such answer and defense alleges:

1. That this defendant, Hughes Bros. Timber Company is a co-partnership consisting of Frank J. Dacey, D. J. Arpin, Thomas H. Hughes and George J. Hughes, having their prin-
10 cipal place of business at Duluth, Minnesota.

2. That at the present time and during all times herein stated said defendant, Hughes Bros. Timber Company is and has been engaged in the business of cutting pulpwood in Cook County, Minnesota, and in the year 1922 contracted to sell all the pulpwood cut by it to the Hammermill Paper Company at Erie, Pennsylvania.

3. That during all the times herein stated and especially in the logging season of 1921-1922 it cut pulpwood in the
11 Town of Hovland, Cook County, Minnesota, piling the same on the ice in the rivers and as soon as the ice would break up in the spring cause said pulpwood to be transported by the streams and rivers from the place where it was cut, down the Pigeon River to Lake Superior, where it would be shipped by boat to the mills of the Hammermill Paper Company at Erie, Pennsylvania; and all pulpwood cut by this defendant in the County of Cook, Minnesota, had been started on its journey from the place where it was cut, to Erie, Pennsylvania.

4. That said pulpwood so assessed was never at any time destined for any other place than Erie, Pennsylvania,
12 and long before May 1, 1922, and long before any assessment of said pulpwood was made by the officers of said Cook County, Minnesota, the same was in process of transportation by continuous route on a continuous journey from the place where said pulpwood had been piled on the ice the winter previous, to Erie, Pennsylvania.

5. That while said pulpwood was in actual transit from

the place where said pulpwood was manufactured in the State of Minnesota to Erie, Pennsylvania, said pulpwood did not have any situs in the State of Minnesota and was not subject to taxation therein, the same being destined from the woods where the same was cut in Minnesota, to the paper mills of 13
the Hammermill Paper Company at Erie, Pennsylvania, and was in actual transit and had started on its interstate journey by a continuous route or journey.

6. That while said pulpwood was being transported in such continuous route or journey, certain officers and tax officials of Cook County, Minnesota, proceeded to tax same for the purposes of taxation, and made and filed with the County Auditor of said County a list thereof and other property owned by this defendant placing on the same the following assessed valuation: 14

Stoves, Cooking Utensils and blankets	$ 125.00
10 heads of horses	266.00
2 wagons and 11 sleighs	133.00
20 harnesses and saddles	30.00
Blacksmith outfit and tools	133.00
10,000 cords Pulpwood	21,233.00
Total assessed valuation	$21,920.00

That said valuations were approved by the Minnesota Tax Commission. 15

That thereupon there was levied upon and against said property of this defendant taxes in the sum of $2,654.09 on all of said property.

7. That thereafter said taxes not being paid, there was added thereto as penalty, interest and cost thereon, the sum of $265.41.

8. That thereafter in April, 1923, the County Treasurer

of said County filed with the Clerk of said District Court, a certified list of the personal property taxes delinquent on April 1, 1923, and included in said list the taxes hereinbefore mentioned levied against the property of this defendant as aforesaid, the name of the defendant, Hughes Bros. Timber
16 Company, appearing in said list so filed as aforesaid.

9. That this defendant hereby answers and sets forth its defense and objects to the said taxes and penalties for the purpose of having the same abated, vacated and set aside and the defendant discharged therefrom, and the defendant alleges and avers that said pulpwood was not subject to taxation in the State of Minnesota at the time it was assessed as aforesaid, for the reason that the same was at said time and had been for a long time prior thereto in actual transit in continuous route or journey from the State of Minnesota to the State of Pennsylvania as aforesaid, and that said property
17 had no situs whatever in the State of Minnesota for taxation; and further, that said tax is a burden upon Interstate Commerce attempted to be placed thereon contrary to the Constitution and laws of the United States.

WHEREFORE, said defendant, Hughes Bros. Timber Company prays judgment that said taxes and penalties be abated and set aside and that said defendant, Hughes Bros. Timber Company be released and discharged therefrom and all obligations therefor, (except as to the proportionate part of said tax that would be payable on the personal property hereinbefore enumerated, that is, on an assessed valuation
18 of $687.00) and that defendant have judgment for its costs and disbursements.

Dated April 12, 1923.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Defendant.
1200 Alworth Building,
Duluth, Minnesota.

State of Minnesota)
)ss.
County of St. Louis)

H. A. Carmichael, being first duly sworn, on oath says: that he is one of the attorneys for the defendant in the within entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason this verification is made by affiant is that he has peculiar knowledge of all the matters therein stated. 19

H. A. CARMICHAEL

Subscribed and sworn to before me
this 12th day of April, 1923.
Edith Sundholm,
Notary Public, St. Louis Co., Minn.
My Commission expires July 20, 1924. 20
(N.S.)

(Same Title)

The above entitled action being regularly on the calendar for the general June, 1923, term of the above named court, came duly on for trial at the court house in the Village of Grand Marais, Cook County, Minnesota, at 11:55 o'clock A. M., on Tuesday, the 19th day of June, 1923, before the Honorable Martin Hughes, judge of said court, without a jury, Messrs. S. C. Murphy and H. H. Phelps appearing as attorneys for the plaintiff, and Messrs. Washburn, Bailey & Mitchell, appearing by Mr. H. A. Carmichael, appearing as attorneys for the defendant, whereupon the following proceedings were had and testimony was taken, to-wit: 21

Mr. Carmichael: I would like at this time to ask the privilege of amending the answer by striking out the words "Hammermill Paper Company, Erie, Pennsylvania," wherever they occur in the answer, and inserting in its place or in their places the name of "Central Paper Company, of Muske-
22 gon, Michigan." The error was on my part. I understood that the sale of the pulp had been made to the Hammermill Paper Company, but it had not. It has been made to the Central Paper Company, of Muskegon, Michigan.

The Court: Any objection?

Mr. Phelps: No objection, your Honor.

The Court: It ma ybe so amended. Central Paper Company, of Muskegon, Michigan?

Mr. Carmichael: Central Paper Company, of Muskegon,
23 Michigan. It occurs several places throughout the answer, your Honor. Is the court familiar with the proceedings?

The Court: No; I have not read the pleadings.

Mr. Carmichael: The question involved is the question of the validity of a tax placed upon some pulpwood by the assessor of the Town of Hovland, in this county, for the year 1922, May 1, 1922. The claim of the answering defendant, Hughes Brothers Timber Company, is: 1st. That it did not own the pulpwood; and, 2nd. That the pulpwood in question
24 was at the time an article of interstate commerce and was in process at the time of being transported from the place where it was cut in the Town of Hovland to Muskegon, Michigan, bringing the case within the Hammermill Paper Company case in 149 Minn. page 414. I would like to call as the first witness Mr. Piper.

Mr. Phelps: If the Court please, I suppose that the list

containing this tax levy filed with the clerk by the treasurer, as the statute provides, may be considered in evidence?

Mr. Carmichael: That is right; that is accurate.

Mr. Phelps: I presume it is part of the files of the court anyway, and if it is, it may be considered as in evidence? 25

Mr. Carmichael: Yes, that is accurate.

FOREST B. PIPER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carmichael: 26

The Court: Q. What is your full name? A. Forest B. Piper.

Q. Forest B. Piper? A. Yes, sir.

Mr. Carmichael: Q. Mr. Piper, in the winter of 1921 and 1922 whom were you employed by? A. Hughes Bros. Timber Company.

Q. Whereabouts? A. The headquarters was at Hovland, Minnesota.

Q. The headquarters were at Hovland, Minnesota? A. Yes, sir, the office. 27

Q. And that is in this county? A. That is in this county.

Q. What river flows through the Town of Hovland? Does the Swamp River flow through that town? A. No.

Q. You said "No"? A. "No, sir."

Q. The Hughes Bros. Timber Company was engaged in cutting pulpwood that winter? A. Yes, sir.

Q. And as the pulpwood was cut where was it placed? A. It was hauled onto the Swamp River and on the banks and piled there.

The Court: The clerk advises me that the answer is not filed.

28

Mr. Carmichael: Yes, the answer has been filed, and we have the clerk's letter acknowledging receipt of it.

The Clerk: The answer is filed, I think, but I believe somebody has taken it out this morning.

Mr. Carmichael: Yes. It was filed within the ten day statutory period.

The Court: I see.

Mr. Carmichael: Q. You stated the pulpwood as cut was piled on the Swamp River and on the banks? A. Yes.

29

Q. Now, it being hauled on the river, you mean hauled out and piled on the ice? A. On the ice.

Q. Now, when in the year 1922 did the drive on the Swamp River commence? A. The time for the drive in the Swamp River commenced on the 29th.

Q. The 29th day of— A. Of April.

Q. Were you there? A. I was there.

Q. And did you keep the time of the men? A. I did.

Q. Was all the pulpwood that was piled on the banks put into the river on or by the 29th day of April? A. Yes.

30

Q. Now, the Swamp River flows into what river? A. Pigeon.

Q. The Pigeon River? A. Yes, sir.

Q. That is the boundary between Cook County, Minnesota, and the Province of Ontario, Canada? A. Yes, sir.

Q. And did you follow the drive down the river? A. Yes, sir.

Q. Were you on the tail end of the drive or the head end? A. I was on the tail end.

Q. The tail end? A. Yes.

Q. How many days did it take to drive the pulpwood down the river? A. Eighteen.

Q. And when it got to the mouth of the Pigeon River 31
what was done there? A. It was held there by booms, two sets of booms.

Q. Do you know for what purpose it was held there? A. I suppose for the purpose of loading.

Q. For loading? A. Yes.

Q. To await the arrival of boats? A. Yes, sir.

Q. And when did you leave the mouth of the Pigeon River that spring? A. I left there about the 24th of May.

Q. The 24th of May? A. About that.

Q. Had any of the pulpwood been loaded on boats at the time you left? A. No. 32

Q. Was there still ice on the bay at the time you left; do you recall? A. No, there was not.

Q. I see. And the bay you speak of is right at the mouth of the Pigeon River? A. Yes.

Q. And is part of the dividing line between America and Canada? A. Yes, sir.

Q. Yes. You may inquire.

CROSS-EXAMINATION

33

By Mr. Phelps:

Q. When did you commence working for this company that got out these logs? A. I started for Hughes Bros. Company in November of 1920.

Q. Well, you were with them then during the winter months when the logs were cut, when the timber was cut? A. Yes, sir.

Q. And that timber was cut in the winter of 1921 and 1922? A. Yes, sir.

Q. And it was all cut from standing timber in the town of Hovland, was it not? A. Well, I would not swear that it was in the Township of Hovland. It was right in that terri-
34 tory there.

Q. In that district? A. Yes.

Q. All in Cook County? A. Yes.

Q. And this timber, or logs that were gotten out were all pulpwood, were they? A. It is all pulpwood, yes, sir.

Q. And they were hauled from the woods where they were cut to the Swamp River, did you say? A. Yes, sir.

Q. And the Swamp River is a tributary of the Pigeon River? A. It empties into the Pigeon River, yes, sir.

Q. Now, was this pulpwood piled on the bank or on the ice? A. It was piled both.

35 Q. Both? A. Both on the ice and on the bank.

Q. Both on the bank and on the ice? A. Yes.

Q. Do you remember when they finished hauling to the ice and depositing it there? A. When the teams were hauling?

Q. Yes, when they finished? A. No, I would not recall that.

Q. Well, about when? A. Well, it must have been along the latter part of March, somewheres along there, as close as I can remember.

Q. The latter part of March? A. Yes.

36 Q. And this pulpwood all remained there then on the ice and on the bank of the Swamp River until, you say, the 29th of April; was that it? A. The 29th of April.

Q. The 29th of April. Then had the ice thawed in the river? A. Yes, sir.

Q. And they commenced then depositing these logs into

the river, did they? A. They were all in on the 29th. They were depositing them before that.

Q. Well, didn't you say they commenced driving on the 29th? A. I say that the drive pay commenced on the 29th. The wages are different than at the camp. And on the 29th 37
they started down the river on the back end of the logs and the drive started—the drive pay started.

Q. How far from the mouth of the Swamp River was it where this timber was piled? A. I should judge that was around two miles, two and a half.

Q. Do you know how long it took to run the logs down to the Pigeon River? A. Well, from the 28th; they all went in a night there, practically all went down in a lump, I would say; that is it passed—

Q. What is that? A. I say, it did not take very much time for it to go down there. The water was very fast. 38

Q. It was a swift current? A. Very swift.

Q. Well, it took how long, did you say, to do all the driving down to the mouth of the Pigeon? A. Eighteen days.

Q. Eighteen days? A. Yes.

Q. Do you know just where these logs were on the first day of May, 1922, or about where? A. Let's see. If I remember rightly, they were at the Cascade Dam; somewheres along there. I won't say for certain.

Q. In the Pigeon River? A. They were in the Pigeon River, yes.

The Court: Q. You are sure they were in the Pigeon 39
River?

A. Yes, sir.

Mr. Phelps: Q. Who was doing this driving? A. Hughes Bros. Timber Company.

Q. Hughes Bros. Timber Company. Is that a partnership or is it a corporation?

Mr. Carmichael: I will furnish a witness for that.

Mr. Phelps: How is that?

Mr. Carmichael: Mr. Hughes is here and will tell all about that.

40

Mr. Phelps: Q. And how long did you stay with the company after this drive was finished? A. Well, I stayed at the mouth of the Pigeon there until about the 24th of May.

Q. And did you say that any of the timber was loaded on boats when you left? A. There was none loaded on boats when I left.

Q. You do not know when it was finally shipped out? A. No, I do not.

Witness Excused.

41

At this time an adjournment was taken until 1:30 o'clock P. M., Tuesday, June 19th, 1923, at which time proceedings were resumed, as follows:

GEORGE J. HUGHES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

42

By Mr. Carmichael:

The Court: Q. What are your initials? A. George J. Hughes.

Mr. Carmichael: Q. George J. Hughes. Mr. Hughes, are you a member of the answering defendant here, Hughes Bros. Timber Company? A. Yes, sir.

Q. What is that concern, a corporation or co-partnership? A. It is a co-partnership.

Q. And please name the members? A. Francis J. Dacey, Thomas H. Hughes, D. J. Arpin, and myself, George J. Hughes.

Q. And were you in charge of the operations during the winter of 1921 and 1922 in the Town of Hovland and thereabouts? A. Yes, sir. 43

Q. Can you tell what time in the spring of 1922 the drive finally got away in the river? A. Yes, sir. It broke some time previous to the 28th, and the river was cleared out on the 29th of April.

Q. Of April. Was the wood that had been left on the bank of the river all put in the river so it was all afloat on the 29th of April? A. Yes, sir, at 3:00 o'clock.

Q. 3:00 o'clock in the afternoon? A. Yes, sir.

Q. What time was the drive finally over down the Pigeon River? A. The drive was over—well, we paid driving wages for eighteen days of driving time, and the time started —the driving time started for the men on the morning of the 29th; that was the day that the crew got into the Pigeon River off the rear. Now, I could not give you just the exact date. 44

Q. It ran eighteen days after that? A. Eighteen days from the 29th.

Q. And when the timber got to the mouth of the Pigeon River it was boomed there? A. Yes, sir.

Q. For what purpose? A. Well, we had to hold it there until navigation opened and until we could get the boats in there to load. 45

Q. Was it due to natural causes that it was not loaded previously? A. Yes, sir. There was no other way that I know of, of getting it.

Q. And was all the wood loaded from the Pigeon River booms during the summer of 1922? A. Yes, sir.

Q. And who furnished the vessels to carry the wood? A. The Central Paper people.

Q. Is that the concern to which the paper was sold—or
46 the pulpwood was sold? A. Yes, sir.

Q. And their place of business is where? A. Muskegon, Michigan.

Q. And was all this wood actually shipped to Muskegon, Michigan? A. Yes, sir.

(Contract marked for identification as Defendant's Exhibit 1.)

Mr. Carmichael: I might state, your Honor, relative to this Defendant's Exhibit 1, I have shown it to Mr. Phelps, and this defendant searched for the original yesterday
47 throughout its office at Duluth and were unable to find it. I would like to offer Defendant's Exhibit 1 if Mr. Hughes will say it is a correct copy of the original, except as to signatures, and with the understanding that if we can locate the original we will produce it to the court later. I do not want to take any advantage of counsel or anything of that nature, but we searched for it and were unable to find it.

Mr. Phelps: Well, it is objected to, if the Court please, on the ground it is incompetent, irrelevant and immaterial, not an executed contract, and that it is not admissible under
48 the pleadings, and it does not tend to prove any issue that is raised by the answer. (Defendant's Exhibit 1 handed to the Court by Mr. Carmichael.)

The Court: Q. Is this the agreement under which you operated, under which that wood was cut, and sold, and delivered to the Paper Company? A. Yes, sir.

The Court: Is there any objection on the ground that it is not the original, Mr. Phelps?

Mr. Phelps: Yes, your Honor.

The Court: It will have to be sustained for the present 49
at least, gentlemen.

Mr. Carmichael: Then it may be understood that at some time convenient to court and counsel, at Duluth, say tomorrow or the next day, if we succeed in locating it that we may submit it to the court?

The Court: Or lay the foundation for this copy.

Mr. Carmichael: Yes, lay the foundation if we cannot find it.

Mr. Phelps: Well, if you could find the original that 50
would answer the purpose. Of course it would not do for me to admit it, your Honor, in the position I am in, because it might make a material difference, and I did not know that any contract of that kind was ever made.

The Court: Well, the objection will have to be sustained.

Mr. Carmichael: All right.

The Court: You can supply the proof later.

Mr. Carmichael: Q. Mr. Hughes, you have already 51
stated that the wood was sold to the Central Paper Company, in Muskegon, Michigan? A. Yes, sir.

Q. And do you know when the contract was entered into relative to that? A. I can't just give you the exact date on which it was made. It was some time either the latter part of October, or November.

Q. What year? A. 1921.

Q. 1921? A. Yes, sir.

Q. And what provision was made for payment of the wood? A. We were to receive—

Mr. Phelps: Well now, if the Court please, I object to this as not the best evidence.

52 The Court: Sustained. That is in the contract, I take it?

Mr. Carmichael: That is true, your Honor.

Mr. Carmichael: Q. As the wood was cut, Mr. Hughes, in the woods, did the Central Paper Company make any payments for the wood as cut? A. They did.

Q. How much? A. $3.00 a cord.

Q. And was that on an accurate measurement or an estimated measurement? A. On an approximate estimate.

Q. On an approximate estimate? A. Yes.

53 Q. And then were there any additional payments made when the wood arrived at the Pigeon River booms? A. Yes, there was an additional payment made when the wood got to the mouth of the Pigeon River.

Q. The mouth of the Pigeon River? A. Yes.

Q. And how much was that? A. Well, that was $3.00 more a cord.

Q. $3.00 more, making $6.00 up to that point? A. Yes.

Q. And then when was final payment made? A. Final payment was made on the wood when it was measured at Muskegon, Michigan.

54 Q. And it was there inspetced, was it? A. Yes, sir.

Q. And final payment made on the measurements made at the paper mills? A. Yes, sir.

Q. And the final payment was how much a cord? A. The final payment then was $6.00 more a cord. You mean the total?

Q. And that would make a total of how much? A. That would make a total of $12.00.

Q. $12.00? A. Yes.

The Court: Q. Double cord or single cord? A. Single cord.

55

Mr. Carmichael: Q. Now, for the wood that was cut in the woods, had the advance payment, the first payment we will say of $3.00 per cord, been made on all of that wood prior to the time the driving commenced in the spring of 1922? A. I do not just understand that.

Q. What I am asking is, if the payment of the approximate estimate of $3.00 per cord had been made on all of the wood at the time the driving was commenced in the spring of 1922? A. On all the wood that we had landed?

Q. Yes, sir. A. Yes, sir.

56

Now, the delinquent personal property tax list and assessment roll, Mr. Hughes, states that you were assessed for 10,000 cords of pulpwood? A. Yes, sir.

Q. Was all the pulpwood that you cut and landed sent down the river? A. Yes, sir.

Q. And was all of it shipped to Muskegon, except such as was sunk in the river? A. Yes, sir, all but the deadheads.

Q. All but the deadheads? A. Yes.

Q. And what was the actual measurement of the wood that arrived at Muskegon?

57

Mr. Phelps: Just a moment. I object to this as incompetent, irrelevant and immaterial, not admissible under the answer; no issue of values made here by this answer.

The Court: Overruled. You may answer.

Mr. Phelps: Exception.

A. May I have the question?

(Question read.) A. 7,531 cords.

Mr. Carmichael: Q. 7,531 cords. Now, the delinquent personal property tax list and the assessor's list shows that on May 1st, 1922, you were assessed for stove, cooking utensils, and blankets, $125.00; you had such personal property, did you? A. Yes, sir.

58

Q. And 10 head of horses, $260.00; you had such horses? A. Yes, sir.

Q. And 2 wagons and 11 sleighs, $133.00; you had wagons and sleighs? A. Yes, sir.

Q. 20 harnesses, and saddles, $30.00; you had such? A. Yes.

Q. And blacksmith outfit and tools, $135.00? A. Yes, sir.

Q. You had such, did you? A. Yes.

59

Q. Yes. That is $133.00 instead of $135.00, Mr. Reporter. You are perfectly willing to pay your taxes on that property? A. Yes, sir.

Mr. Carmichael: And when the findings are drawn here it is perfectly agreeable to pay on that proportion. We have no defense as to that part of the tax. You may inquire.

CROSS-EXAMINATION

60

By Mr. Phelps:

Q. Mr. Hughes, did you have charge of the work of getting out that timber yourself? A. Yes, sir.

Q. And you had charge of the business until the timber was delivered? A. No, sir. I have another brother who is in with us, Thomas H. Hughes, that came to the camp on the 17th of March, or on the 15th of March, and I went to Duluth on the 16th and was in Duluth on the 17th of March.

Q. Well, weren't you here after that? A. Yes, sir.

Q. What time after that were you here at the—or assisted in the logging operations? A. I was back at Hovland on the 27th of April, 1922.

Q. And you were out there where the logs were? Were 61
you at the river? A. Yes, sir.

Q. Did you have any other logs besides this one lot? A. No, sir.

Q. That is all the timber you had there? A. Yes, sir.

Q. Well now, the assessor came to you, did he not, later on, in May, about the matter of assessing this property? A. Which property?

Q. These logs, or all your property up there? A. He came to me— I can't give you the date, but he came to me some time during the summer; I don't think it was in May, but it might have been; he came to the office at Hovland. 62

Q. Yes. And asked you to make out a statement, did he? A. No, sir.

Q. He didn't? A. No, sir.

Q. Didn't you make out any statement of assessment— A. No, sir.

Q. —for assessment? A. No, sir, I don't think I did.

Q. Did you sign any? A. I might have signed one but I did not make one out. I don't remember of signing it either.

Q. If you signed any you looked it over, did you not? A. Yes, if I signed one I must have looked it over.

Q. And you told the assessor at that time that on the 63
first day of May there was only 1,500 cords of pulpwood on the bank of the river, did you not? A. No, sir.

Q. You didn't? A. No, sir.

Q. What did you tell him in that regard? A. I don't remember of telling him anything about pulpwood.

(Statement marked for identification as Plaintiff's Exhibit A.)

Mr. Phelps: (Addressing Mr. Carmichael): I want to ask him some questions about this. Do you want to look at it?

Mr. Carmichael: Are you going to offer it?

64 Mr. Phelps: Yes, I will later.

Mr. Carmichael: Yes.

Mr. Phelps: Q. I show you this instrument which the reporter has marked Plaintiff's Exhibit A. Is this your signature at the end of that? A. Yes, sir.

Q. You signed that and turned it over to the assessor, did you not? A. I signed that paper.

Q. Where were you at that time? A. Right in the office at Hovland.

65 Q. Yes. And the assessor was there, was he not? A. Yes, sir.

Q. You turned it over to him? A. I think he had that paper with him when I signed it. He brought it into the office.

Mr. Phelps: We offer this in evidence in connection with the cross-examination.

Mr. Carmichael: Oh, that is objected to as incompetent, irrelevant and immaterial. Clearly something has been filled in at different times here, your Honor. All anyone has to do
66 is look at the capital "S" on the word "Spruce", and the capital "S" on the word "Sleighs", and the capital "S" on the word "Stoves", and he can plainly see that it was not filled out at the same time, and apparently not by the same party.

The Court: Will you let me see it, Mr. Hughes?

The Witness: Yes, sir (handing exhibit to the court).

The Court: Overruled.

Mr. Carmichael: Exception.

Mr. Phelps: I think that is all.

67

RE-DIRECT EXAMINATION

By Mr. Carmichael:

Q. Mr. Hughes, you recall the occasion of the assessor of the Town of Hovland calling upon you at your office? A. Yes, sir.

Q. Do you remember whether— well, I do not want to take the chance of pressing that now. That is all for the present. I might ask to put Mr. Hughes back later. That is all for the present.

68

Witness excused.

GEORGE J. HUGHES, a witness on behalf of the defendant, having been previously sworn, recalled for further examination and testified as follows:

DIRECT EXAMINATION

By Mr. Carmichael:

Q. Mr. Hughes, concerning this Plaintiff's Exhibit A, do you recall the time the assessor for the Town of Hovland called upon you at the time you signed that paper? A. Yes, sir. 69

Q. Was it in the same shape it is in now at the time you signed it? A. No, sir.

Q. What talk did you have with the assessor concerning pulpwood; state what it was? A. When he came there he

asked me for a scale of the wood that we had for the winter.

Q. And did you give him the scale of the wood you had for the winter? A. No, sir.

Q. Did he ask you how much wood you had cut during the winter? A. He asked me how much wood we had cut
70 during the season of 1921 and 1922.

Q. Did you tell him? A. No, sir. I told him if he wanted to find out to go and measure it, and that I thought that that was what he was getting his pay for, and every place I had ever been the assessor had always looked at what he was assessing, and that there was a driving team and buggy and a man to drive him, and he could go into the woods any time he wanted to.

Q. And were those figures and words, "1,500 cords spruce" filled in at the time you signed that? A. No, sir.

Q. Was the value set opposite of "$6,000.00" and "$2,-
71 000.00" as the assessed value; were those figures filled in at the time you signed that? A. I didn't see that now. Is this it here (indicating)?

Q. I am asking if the figures "1500 cords spruce pulpwood" and the figures "$6,000.00 and "$2,000.00", if these were filled in at the time you signed that paper? A. No, sir.

Q. You do not know who put them there? A. No, sir

Q. Or when? A. I don't.

Q. Was there anything in that paper in your handwriting except the signature in pen and ink? A. No, sir. The only thing is my signature on this paper that is in my writing.
72 Q. That is all, Mr. Hughes.

CROSS-EXAMINATION

By Mr. Phelps:

Q. Mr. Hughes, you say you told the assessor he could go into the woods and measure the pulpwood if he wanted to?

A. I told him he could have a driving team and a man to drive him.

Q. Drive him where? A. And go up and measure the wood.

Q. Where was the wood? A. The wood at that time 73
was at the mouth of the Pigeon River.

Q. Do you remember what time that was? A. No, sir, I do not. I told you I didn't remember the date.

Q. Where was this; where did this interview take place? A. At the office; at what we call the office, at Chicago Bay, or at Hovland. It is right across from the dock.

Q. You have a regular place of business there? A. Well, we have a little headquarters office there where the man is that takes care of our supplies, and takes care of the incoming and outgoing supplies for the camps.

Q. You have been logging for some years in that vicin- 74
ity, have you? A. This is the second year.

Q. This one that you speak of? A. No, sir; this was the first.

Q. That was the first? A. Yes.

Q. The one which this assessment arises over? A. Yes, sir.

Q. That is all.

RE-DIRECT EXAMINATION 75

By Mr. Carmichael:

Q. Mr. Hughes, I do not know whether I asked you or not: By what time of the year 1922 had all this pulpwood been shipped from the bay at the mouth of Pigeon River to Muskegon? A. Well, I can't give you the exact date of that either, but it was around the latter part of July, to the best of my knowledge.

Q. That is had all been shipped out? A. Yes, sir.

Q. That is all.

Witness Excused.

Mr. Carmichael: That is our case, your Honor. De-
76 fendant rests.

JOHN ELIASEN, called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Phelps:

77 Q. What is your name? A. John Eliasen.

Q. And where do you live? A. Hovland.

Q. Hovland Township, in this county? A. Yes.

Q. Just answer so the reporter can get it. A. Yes.

Q. And were you the town assessor up there in the year 1922? A. Yes, sir.

Q. Did you make the assessment of the personal property of the Hughes Bros. Timber Company for that year? A. Yes, sir.

Q. And how did you do it? A. I went down to the head office at the bay.

78 Q. Chicago Bay? A. Yes.

Q. And whom did you interview there, if anybody? A. I was down there two or three times before, and finally talked with Tom a couple of times and it seems he didn't have time to go with me—

Q. Well, when was that? A. Finally I got George.

Q. When was that? A. On the 21st of June I got George.

Q. You got George, this man that has just been on the stand? A. Yes.

Q. Did you have a talk with him about the amount of timber that they had up there? A. Yes, I asked him how much they had.

Q. Well, was that with reference to the timber that was there on the first of May? A. Yes, sir. 79

Q. What did he say? A. Well, he said they had it in the river, all of it except 1500 cords.

Q. He said they had it all in the river except 1500 cords on the first of May? A. Yes.

Q. Did he say where the 1500 cords were? A. On the bank.

Q. On the bank. The bank of what river? A. Swamp River.

Q. Then he told you at that time that on the first of May there were 1500 cords on the bank of the Swamp River? A. Yes, sir. 80

Q. And the balance of it he said was in the river, did he? A. Yes.

Q. Yes. Well, I show you this instrument Plaintiff's Exhibit A; is that the assessment sheet that you made out for the assessment of this company? A. Yes, sir.

Q. And the one that you turned in to county auditor, is it? A. Yes, sir.

Q. And whose handwriting is that in? A. My own.

Q. What is that? A. My own.

Q. Then you did the writing that is on there? A. Yes. I just asked him the questions what he had. 81

Q. You asked him the questions, and you set down the statements and figures as he gave them to you, did you? A. Yes, sir.

Q. And then did he sign that? A. He signed it, yes.

Q. Yes. And you turned it in to the county auditor as your assessment? A. Yes.

Q. Just answer so that the reporter can get it. A. Yes, sir.

Q. Yes. Have there been changes made in that since he signed it? A. Well, there is some here I raised myself. I raised it from $200.00 to $600.00 here (indicating).

82 Q. That is, you mean the valuation? A. Yes, the valuation on the horses. The rest of it is the same. Just the valuation on the horses.

Q. And that 1500 cords of pulpwood that is on there, you put there that amount at that time, did you? A. Yes, sir.

Q. He told you it was there? A. Yes, sir.

sir. He told me it was there.

Q. Yes. You may take the witness.

83 CROSS-EXAMINATION

By Mr. Carmichael:

Q. Referring to item number 30 on page 2 of this Defendant's Exhibit 1, do you observe that there is a figure "4,000" placed there, and erased, and then "6,000"? A. It might be a mistake when I put it down.

The Court: Q. I did not hear you. Speak a little louder. What was the answer? A. Well, I might have made a mistake on the figure when I put it down there.

Mr. Carmichael: Q. Who made that change? A. I did.

84 Q. When? A. At the time.

Q. What time? A. The 21st of June.

Q. The 21st of June? A. Yes.

Q. Well, when did you make these other changes that you speak about; you are speaking about some other changes? A. I made the changes on the horses according to the rest of the values around town.

Q. Oh, then afterwards, after the 21st of June you made some other changes to bring it up to the valuation of the others? A. I fixed up the paper, yes.

Q. How long after the 21st of June? A. Well, a couple of days, I guess, I fixed the paper up. 85

Q. Now, where did the county auditor get this figure of 10,000 cords that appears on the assessment roll? A. The county commissioners raised it.

Q. Raised it from 1500 to 10,000 cords? A. Yes.

Q. And you never saw any pulpwood there yourself at all, did you? A. No, I was never up there.

Q. Never up there? A. No.

Q. And you do not know whether there was one cord or 10,000 cords? A. No. He told me there was 1500 cords, that it all I know—

Q. That is all you know about it? A. —and the rest 86 of it was in the river.

Q. That is all.

Witness excused.

Mr. Phelps: I haven't ever examined the return of the treasurer. I suppose that somewhere on there it shows the fact that this valuation was raised by the board of review or county board, and of course, if your Honor please, what we claim is the right to taxation of this entire quantity of pulpwood. I apprehend that is shown by the change—the 87 change is shown by those papers; if it is not, I want to introduce in evidence, of course, the necessary testimony to show that. You do not make any claim, Mr. Carmichael—that is, you admit that the change was made by the county board?

Mr. Carmichael: I do not know who did it; I never knew that paper was in existence before.

Mr. Phelps: No, not this one; I do not mean this, but I mean the final assessment.

Mr. Carmichael: I know it shows 10,000 cords, and I so recite in the answer, but I do not know who made it, whether it was some clerk in the auditor's office or somebody
88 else; I don't know.

Mr. Phelps: The law makes this prima facie evidence of the proceedings, so I guess that is all.

Mr. Carmichael: That is all, your Honor.

Mr. Phelps: That is all.

The Court: Yes. It will be held open for the purpose of receiving testimony with reference to the contract.

Mr. Phelps: Now, if the Court please, this is largely a question of law, and I presume it better be submitted on briefs.

Mr. Carmichael: I am ready to argue it now, or I am
89 willing to submit it on briefs.

Mr. Phelps: I would prefer to submit it on briefs, because the evidence is a little different from what I had understood about the matter before.

The Court: I suppose the question you have in mind is the right to tax the property even if it was in Pigeon River; is that it?

Mr. Phelps: Yes.

The Court: I think you had better submit it on briefs.

Mr. Carmichael: I think I called your Honor's attention to the Hammermill case this morning, which is on all fours
90 with this case.

The Court: You called attention to the 149 Minn.

Mr. Carmichael: Yes, page 414.

The Court: You may submit it on briefs, gentlemen. How much time will you want on your briefs?

Mr. Phelps: I suppose that Mr. Carmichael should prepare his brief first.

The Court: Yes.

Mr. Carmichael: 10 days is sufficient for me after that contract is in evidence, and if we can get it in tomorrow or the next day 10 days will be sufficient.

The Court: I suppose the contract would not have any particular bearing on the question of law, would it, gentlemen?

91

Mr. Carmichael: Not on the question of law, your Honor, but it has on the question of title. Under the contract the title to all this timber passed in the woods when they made the $3.00 payment.

The Court: Yes, according to this copy that I examined that was the provision there.

Mr. Phelps: Well, circumstances may be such that I would not be able to reply in 10 days.

Mr. Carmichael: That is agreeable to me. Take all the time you need.

The Court: Get them around before I forget all about the facts, gentlemen. 92

LIST OF DELINQUENT PERSONAL PROPERTY TAXES

State of Minnesota)
)ss.
County of Cook)

I, Chas. Seglem, County Treasurer of Cook County, State of Minnesota, do hereby certify that the foregoing and attached list is the list of uncollected personal property taxes made by the Sheriff of said County to the Clerk of the District Court of said county, and by said Clerk delivered and filed in my office. That I have compared said list with the tax duplicates in my office and find that all personal property taxes for the year 1922 reported by me to said clerk, which are not included in said list of said Sheriff above referred to and hereto attached, have been received by me as such Treasurer and paid into my office by said Sheriff or otherwise, except the following items, which have not been paid into my office nor received by me, to-wit: 93

Name of Person Assessed	Township or District	Tax	Penalty Fees and costs	Total Tax and costs
Dewar, John	Rosebush	$ 50.25	$ 5.03	$ 55.28
Johnson, Ed.	"	1.05	.11	1.15
Jacobson, John	Colville	.68	.07	.75
Central Paper Co.	"	1,363.28	136.33	1,499.61
Ericksen, Jens	Hoveland	3.54	.35	3.69
Lennell, E. H.	"	24.09	2.41	26.50
Marken, Christ	"	28.59	2.86	31.45
Scott Bros.	"	77.24	7.72	84.96
Watsa, Matt	"	44.53	4.45	48.98
Hughes Bros. Timber Co.	"	2,654.09	265.41	2,919.50
Roedter, Fred W.	"	139.00	13.90	152.90
Eliason, George	"	2.76	.28	3.04
Ongstad, Carl	"	4.86	.49	5.35
Englund, Alex	"	.45	.05	.50
Arnold, Marshall	Unog. Terr.	3.24	.32	3.56
Central Paper	" "	21.33	2.13	23.46
Hoyt, A. G.	" "	4.42	.44	4.86
Altschwager, John	" "	8.16	.82	8.98

Given under my hand, this 5th day of April, 1923.

CHARLES SEGLEM, County Treasurer
Of Cook County, Minnesota.

Filed in my office this 5th day of April, 1923. 97

MATT JOHNSON,
Clerk of District Court,
Cook County, Minnesota.

File 1034

PLAINTIFF'S EXHIBIT A

6-19-23 C. D. 98

Every Person of full age and sound mind is required to list his or her property for taxation.

See Assessor's notice on the filing of this sheet.

Before filling out this Schedule, read carefully the extracts from the laws relating to the listing of personal property on page 4 of this sheet.

A schedule of the number and value of all items of personal property, except money and credits, belonging to Hughes 99
Bros. Timber Co. on the first day of May 1922, and required by law to be listed for taxation in the Town of Hovland in the County of Cook and State of Minnesota.

102 101 100

Head of Family (Yes
(No

School District No. 2

ITEMS IN CLASS 2	Number	Owner's Valuation	Assessor's Valuation True and full value	Assessor's Valuation 25% of True and full value
2. Household furniture and utensils, and wearing apparel of members of the family, stoves, cooking utensils and blankets		$500	$500	$125

ITEMS IN CLASS 3	Number	Owner's Valuation	Assessor's Valuation True and full value	Assessor's Valuation 33-1/3% of True and full value
11. Horses, Mules and Asses, three years old and under sixteen years	10	$ 600	$ 800	$ 266

19. Wagons, carriages and sleighs, 2 wagons and 11 sleighs	13	400	400	133
20. Harness and saddles	20	75	90	30
30. Pulpwood, pulp and paper—1500 cord spruce		6,000	6,000	2,000
49. All other property assessable by law in Class 3 not included in items 11 to 48 inclusive— Blacksmith outfit and tools		380	400	133

Summary of Assessment

Totals, Class 1			
Totals, Class 2	500	500	125
Totals, Class 3	6,855	6,890	2,296
Totals, Class 4			
Grand Totals, All Classes	$7,355	$7,390	$2,421

State of Minnesota,)
)ss.
County of Cook)

106 I, the undersigned, do solemnly swear that I have, according to the best of my knowledge and belief, listed in the above schedule all the personal property, except money and credits, owned by me, Hughes Bros. Timber Co. on the first day of May, 1922, and required to be listed in said assessment district for taxation under the laws of this state.

Signed: GEO. J. HUGHES

Subscribed and sworn to before
me this 21st day of June, 1922
J. Eliasen.....Assessor

107

(The foregoing return has been abbreviated to save unnecessary printing, but the same contains the part of plaintiff's Exhibit A germane to this case.)

DEFENDANT'S EXHIBIT 1.

Memorandum of agreement made this 31st day of October, 1921. Between:—The Hughes Brothers Timber Company of Duluth, Minnesota, hereinafter called the Timber
108 Company and Central Paper Company of Muskegon, Michigan, hereinafter called the Paper Company.

For the consideration hereinafter specified the Timber Co. agrees to deliver to the Paper Co. over the rail of vessel and stowed at Pigeon Bay at the mouth of Pigeon River, approximately ten thousand cords of Spruce pulpwood, in which will be allowed eight per cent Balsam. Said pulpwood to be

cut from live standing timber, free from rot, fire char and other defects, all knots to be closely trimmed and diameter not to be less than four inches at the small end of a stick. All to be cut eight foot four inch lengths, with sawed ends, the extra four inches not to be measured in the cordage. 109

The Timber Company agrees to load the wood in boats furnished by the Paper Company for such purpose and stow same away on said vessels as promptly and expediously as possible after their arrival and at the rate of not less than two hundred fifty cords per day, per vessel and will be held responsible for demurrage caused through the Timber Co.'s default. For such purposes they shall furnish all labor and equipment necessary.

The Paper Company shall supply vessels to carry away the said wood during the season of 1922. At least three days 110 notice of arrival of such vessels shall be given to the Timber Company.

The said wood shall be scaled and measured by a representative of both parties when first cargo is loaded and on arrival at Muskegon, Michigan, the Paper Company shall pay balance due for each cargo of wood within five days after delivery at Muskegon by remitting a Chicago or New York draft payable to the Timber Company. Measurement at Muskegon to be basis for final settlement.

The price, per cord, to be paid by said paper Company for 111 all wood finally scaled and measured, delivered and accepted at Muskegon shall be ($12.00) twelve dollars American Funds, F. O. B. Vessel.

The Paper Company agrees to make progress estimates or provisional measurements during the months of January, February and March at river landings and advances will be made of 25% or three dollars ($3.00) per cord for all wood in-

spected and measured. The Inspector furnished by the Paper Company is to be properly assisted by the Timber Company and to be boarded at the Timber Company's camps. Title to wood on which advances are made shall be in the name of the Paper Company and to be branded at time of provisional in-
112 spection and measurement. The Paper Company agrees to advance a second 25% or $3.00 per cord when the wood is delivered in booms at the point of loading in Pigeon Bay and the balance of 50% or $6.00 per cord within five days after delivery at Muskegon as heretofore provided.

Liability insurance to be carried and paid by Timber Company.

Cargo insurance to be carried and paid for by Paper Company.

The condition of this agreement is that the Timber Company warrants its title to said pulpwood and that said pulp-
113 wood shall be free from all liens or encumbrances of any kind when delivered and that the Paper Company shall be entitled to be satisfied on these points before making payment therefor and before chartering vessels.

This agreement will extend to and bind the successors and assigns of the parties hereto.

Sealed, signed and delivered
in the presence of

Hughes Bros. Timber Co.
By T. H. Hughes.
Central Paper Co.
By H. E. Jones, Sec'y.

114

Endorsed on Back:
Contract Central Paper Co.
Filed in my office this
22 day of Sept. 1923.
MATT JOHNSON
Clerk of District Court.
Cook County, Minn.

(Same Title)

STIPULATION

In the Matter of the Personal Property Taxes levied against Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota. 115

IT IS STIPULATED AND AGREED By and Between the parties hereto, by their respective attorneys, that the foregoing transcript consisting of 34 pages of typewritten matter, contains all of the evidence offered or received on the trial of said case, except the personal property tax book for the year 1922 and also all objections, rulings and other proceedings, and that the above named court may allow the same as and for a settled case herein.

H. H. PHELPS, 116
Attorney for Plaintiff,
WASHBURN, BAILEY & MITCHELL,
Attorneys for Defendant.

(Same Title)

ORDER

In the Matter of the Personal Property Taxes levied against Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota. 117

I HEREBY CERTIFY that the foregoing transcript consisting of 34 pages of typewritten matter, has been examined by me and found conformable to the truth and to contain all the evidence offered or received on the trial of this case, except the personal property tax book for the year 1922, and all objections and rulings thereon, and all other proceedings;

that the same including personal property tax book for the year 1922, is allowed as and for a settled case herein.

Dated November....., 1923.

MARTIN HUGHES,
District Judge.

118

(Same Title)

Pursuant to agreement between counsel for the respective parties herein, the above entitled cause came on for further hearing before said court at the court-house in the village of Hibbing, St. Louis County, Minnesota, at 1:45 o'clock P. M., on Saturday, the 1st day of March, 1924, before the Honor-
119 able Martin Hughes, judge of said court, without a jury, Mr. H. H. Phelps appearing as attorney for the plaintiff, and Messrs. Washburn, Bailey & Mitchell, appearing by Mr. James G. Nye, appearing as counsel for the defendant, whereupon the following proceedings were had and testimony was taken, to-wit:

Mr. Nye: If the Court please, I understand that the Court desired some further testimony with reference to the amount or the value of the pulpwood in question.

The Court: No, the Court did not desire it. I advised
120 Mr. Carmichael that if he cared to put in such further testimony that it might be heard today.

Mr. Nye: We would like at this time to introduce evidence on that point. Call Mr. Hughes.

The Court: Any objection to opening up the case for the purpose of receiving that testimony, Mr. Phelps?

Mr. Phelps: No. No; I understood that that would be done.

THOMAS H. HUGHES, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 121

DIRECT EXAMINATION

By Mr. Nye:

The Court: Q. What are your initials, Mr. Hughes? A. T. H.

Q. T. H. Hughes? A. Yes, sir.

Mr. Nye: Q. Your full name is Thomas H. Hughes? A. Yes, sir.

Q. What is your connection with the Hughes Bros. Timber Company? A. I am a co-partner in the firm, and I have 122 a quarter interest in it.

Q. And you have been interested in that company for some time? A. Yes, sir, ever since its organization.

Q. How old a man are you, Mr. Hughes? A. 35; not quite 35. I will be 35 my next birthday.

Q. And how long have you been engaged in the timber business? A. Well, I have worked at the occupation for the last 20 odd years.

Q. Have you during that time had an intimate connection with the actual driving of timber on rivers and handling of timber in the woods? A. Yes, sir. 123

Q. How long has your work in that capacity been going on? A. Handling of river wood and logging? As superintendent of logging operations it has been going on for the last 10 years; and handling the river wood and driving on rivers, I have had considerable of that to do for the last five years.

Q. Are you familiar with the country up around Pigeon

River, in Cook County, and the border between here and Canada? A. Yes, sir.

Q. Have you conducted driving operations up there? A. Yes, sir.

Q. How many years? A. This will be the third spring
124 that we have driven that river.

Q. Have you been in actual charge of that work yourself? A. Yes, sir.

Q. The evidence in this particular case, Mr. Hughes, indicates that during the operations after May, 1922, there reached— what is the name of that company? A. Central Paper Company, at Muskegon, Michigan.

Q. There reached the Central Paper Company at Muskegon, Michigan, 7,531 cords of pulpwood. Have you had some experience in figuring the losses which might occur in driving timber from one point to another on rivers? A. I have in
125 that particular place up there, and we have a loss—

Q. Just a minute. You have had some experience, have you, along that line? A. Yes, sir.

Q. Yourself? A. Yes, sir.

Q. Have you had occasion to figure such losses on the Pigeon River? A. Yes, sir.

Q. And at other places also? A. One other place, yes, sir.

Q. These particular logs— or pulpwood, as I understand it, were first placed in the Swamp River at a point some 33 miles, possibly 35 miles, above Lake Superior, above Pigeon
126 Bay; is that right? A. Yes, sir.

Q. Can you state what would be the loss on pulpwood which had to travel that distance under such conditions as that? A. Well—

Mr. Phelps: In quantity, you mean?

Mr. Nye: In quantity, yes; the percentage of loss.

A. The amount of percentage, yes. The cordage— in the actual cordage on that, I could not give you the actual cordage.

Mr. Nye: Q. Well, let us take this up first: Do you have any personal knowledge of how long that pulpwood would remain in the water? A. Yes, sir. 127

Q. How long would it remain— How long did it remain that year; do you remember? A. Some of that wood remained in the water from about the time the ice would go out, in the latter part of April, until the fore part of September.

Q. So that some of the wood would be in how many months? A. Well, that would be all of May, June, July and August, and possibly a week or so or ten days in September.

Q. Would all of it be in the water that long? A. No, sir. 128

Q. Part of it, I take it, would be picked up immediately by the boats and taken down river— or taken down the lake? A. Yes, sir.

Q. There would be some loss, would there, from the time the wood is put into the river until the time it is taken up by the boats? A. Yes, sir.

Q. What would that loss be due to? A. That loss would be due to a sinkage in the wood in the river, in the driving; a loss in the bark; and the difference in the cull wood that would be thrown out, small wood that would be rejected; and wood that would be broken in the driving. 129

Q. Are you able to state, from your experience, how much that loss would be; knowing the amount of timber that started out, how much would the loss be at the time it reached the mill, under conditions of that kind? A. About ten per cent, sir.

Q. How do you figure that? A. Well, we figure that on our scale, on the total cordage of wood scaled and measured when it is hauled and landed on the river, on the ice; take that total scale and figure it against the total scale that we get at the paper company's dock, and there is a difference
130 of ten per cent there.

Q. Are you able to account for that loss? A. Well, there is— we figure that there is five per cent of that wood that will sink, that we do not get. And there is two per cent of that scale, or wood, that is lost in the bark. And then one per cent small stuff that is rejected by the mill as too small, and they wont take it. And about one per cent for cull, that is wood that is rotten, and big, dozy stuff that they cannot handle at the mill, and some of it is thrown out at the time of the loading and some more is rejected at the mill; we figure there is one per cent there. And then in the driving of this
131 wood down the river there is about one per cent broken; that is, broken up, you know, so it cannot be used.

Q. Making a total of ten per cent? A. Making a total of ten per cent, yes, sir.

Q. Are you able to state whether that is the figure that is used by lumbermen generally in that business? A. Yes, sir.

Q. It is? A. Yes, sir.

Q. So that the mill scale, under conditions like these we are talking about, would be 90 per cent of the amount that actually left the driving operations—that is, left the original
132 starting point? A. Yes, sir. Say, if you have 100 cords and you drive down your wood and you land it, you figure on a 10 per cent loss, which will bring you out 90 cords. Is that the way I understand your question?

Q. Yes. A. Yes, sir.

Q. So that in this particular instance, if the evidence shows that 7,531 cords actually reached the mill, according to

their scale, that would indicate that there had been 10 per cent more had started out than actually reached there; is that true? A. Yes.

Q. In other words, that the 7,531 cords would be 90 per cent of the original amount that was put in the river? A. Yes, sir. 133

Q. Yes. You may cross-examine.

CROSS-EXAMINATION

By Mr. Phelps:

Q. It was your brother who testified at the trial in Grand Marais, was it not, Mr. Hughes? A. Yes, sir.

Q. Yes. And his testimony was that there was 7,531 cords, as I remember it, delivered to the paper company. That delivery took place at Pigeon Bay, did it not, on the boats? 134 A. Yes, sir.

Q. But the figures, I presume, which he gave were the figures that the paper company furnished and paid you people on; was that it? A. Yes, sir.

Q. Yes. Well— A. Mr. Phelps—

Q. There was considerable of that—

The Court: Just a minute, Mr. Phelps, the witness wanted to add something.

A. I would not say that the paper company furnished that figure either, because we had a man there to check that scale along with the paper company's scale, but that was the final 135 scale that we were paid on, on that particular amount of wood.

Mr. Phelps: Q. Yes. You never made any measurement or kept any account of the timber actually gotten out in the woods and banked at Swamp River, did you? A. That was all measured; the wood was all measured as it was put on the river there.

Q. But you haven't any record of that measurement? A. Why, I do not know whether we have or not. It was all scaled and measured, and I think there is a record of that scale somewhere in our office in Duluth.

Q. You have not looked that up? A. No, sir; because
136 it has always been scaled— we scale our stuff every day as we haul it, and measure it, so as to know how much stuff we have on the river.

Q. Did you ship— or, did you run down the river all of the timber that you got out that year? A. Yes, sir.

Q. Some of this timber was boomed at the mouth of the river down there at Pigeon Bay for quite a long time, was it not? A. Yes, sir.

Q. Well, isn't it a fact that there was a storm came up and some of that was driven out into the lake? A. No, sir. We did not lose any wood out into the lake at all, Mr. Phelps,
137 as I understand it. We had some hard blows there, but there wasn't any of that wood taken out into the lake, because it is impossible for it to get out there. When we were loading it we would take and cut a small raft, a day or two days' loading, and run it out to the boat. It is back in the river in a very secure place, and when we would want to load we would cut a small amount, you know, enough to run us a day or so, and take that out. But there was never any wood there gotten away that I know of.

Q. Did your company afterwards take out any of the dead-heads that had sunk in the river along the length of the
138 drive? A. No, sir. They picked up some stuff that was along at the mouth of the river there; there was some of that stuff taken out of there.

Q. Do you know the quantity? A. There was about 25 cords, I should say.

Q. Yes. Well, I guess that is all.

Mr. Nye: I think that is all, unless the Court has some question.

Witness Excused.

Mr. Phelps: Now, if the Court please, Mr. Carmichael 139
in his moving papers for amended findings asked for a finding with reference to the value, the value of the timber in the woods. There is no way— that is, in looking the matter over, looking the papers over, I should say, it seemed to me that the Court might have a little difficulty in figuring out the amour of valuation for taxing purposes unless there is some understanding with reference to the value per cord. That is, if we are to take finally here, if we are to take the amount proven at the trial plus 10 per cent, or take that amount as 90 per cent of the full amount that was in the woods, how is the Court to determine the valuation for taxation purposes without some 140
understanding some way as to the price per cord that that was really worth there. As I understand, the figures that were given— well, the record introduced in evidence at the trial showed, if the Court will remember, certain articles: Stoves, cooking utensils, blankets and so forth, $125.00; 10 head of horses, $260.00 or $266.00; two wagons and 11 sleighs, $133.00; 20 harnesses and saddles, $30.00; blacksmith outfit and tools, $133.00; 10,000 cords of pulpwood, $21,233.00. Now, if the Court please, I bring this up now so that there may be a definite understanding about it. I understand that these figures that were contained in this record are the valu- 141
ations for assessment purposes. I have forgotten whether the statute provides on personal property it shall be 30 or 33-1/3 per cent.

The Court: 33-1/3 per cent.

Mr. Phelps: Yes, 33-1/3 per cent. Then these figures

here must be 33-1/3 per cent of the true value of the property as it was assessed. Now, if instead of this 10,000 cords, the Court is to take another figure which is proven here now, it will be necessary for the Court to know something about the value of that in order to get the proper amount for the as-
142 sessment to be based upon.

The Court: Unless we take the same rate per cord as was taken there by the assessing officers.

Mr. Phelps: I was going to suggest that in as much as Mr. Carmichael asked in his moving papers for the amendments that a price of $7.00 per cord be placed upon that, that I was willing to stipulate that, if it is satisfactory.

Mr. Nye: Well, of course, I guess you must realize and the Court realizes what little connection I have had with this
143 case, but I should think that would be satisfactory. I do not want to stipulate to that without consulting Mr. Carmichael, but I think that would be satisfactory. Otherwise, it seems to me that the proper basis would be, as the Court suggested, simply to reduce this— if there is a reduction by the Court, if there should be a reduction in this 10,000 cords, then take the same rate of valuation that the assessor has used, but I do not know how that would compare to $7.00 per cord, whether it would be more or less.

Mr. Phelps: Well, I do not know; I did not figure it out, but of course I did not know today what evidence would be
144 offered. I thought possibly that matter would be gone into.

Mr. Nye: Does Mr. Carmichael in his moving papers ask for that valuation?

Mr. Phelps: Yes.

Mr. Nye: Then I should think he would be perfectly willing to stipulate to that.

Mr. Phelps: He asks that the Court find a valuation of $7.00 per cord in the woods for taxation purposes, and in my brief I simply said that there was no evidence on that point, and that the Court could not make a finding because there was nothing to base it on. But I saw when I came to come over this that that would have to be arrived at in some way or the other, and the Court would have to have something to base it on, to base that finding on. 145

The Court: The trouble is that there was very little evidence submitted. Mr. Carmichael at the opening of the trial said there were but two propositions involved, or claimed: One was that the title had passed under the contract to the purchaser at the time the assessment was made, or before the assessment was made, and the second was that the timber had commenced its interstate journey before the first of May. Those were the only two propositions involved, he said, so we tried the case with reference to those two propositions only, and evidence on other points is exceedingly meager. 146

Mr. Nye: As I read his memorandum— I just glanced at it coming down on the train— that is the way I read it. I would suggest that the record show that a valuation of $7.00 per cord be stipulated to, subject to the approval of Mr. Carmichael, and if he does not approve then the Court will have to take the figures that the assessor has used, it seems to me.

The Court: Is that agreeable?

Mr. Phelps: That would be satisfactory. 147

Mr. Nye: And we will let your Honor know immediately if Mr. Carmichael has any objection to that valuation, but I do not think he will.

The Court: All right.

Mr. Phelps: Then I suppose the Court would simply

take the valuations or the amounts as proven here now by this testimony and figure that at $7.00 per cord, and then the valuation for taxation purposes would be 1/3 of that.

The Court: Yes.

148 Mr. Phelps: There is another question that I think I ought to bring up here.

The Court: While I think of it, as I recall, Mr. Carmichael said that no question was made with regard to the assessment of the other personal property at the valuation fixed.

Mr. Phelps: Yes; just this one particular item of pulpwood.

Mr. Nye: Yes.

149 The Court: Not as to the other items of personal property.

Mr. Phelps: Then I suppose this situation will arise. If the Court changes the amount of pulpwood and thereby changes the amount of the tax at this time, I suppose the penalty which the law fixed at the expiration of the time for payment, in 1922, will attach to that amount just at it would to this.

Mr. Nye: I do not so understand it; I do not think so.
150 Mr. Carmichael did not indicate anything on that point to me, but I should not think it would.

Mr. Phelps: I should think, your Honor, that unless there was a tender made, that the penalty would attach. The law fixes a 10 per cent penalty because of failure to pay the tax at a certain time. It is now a long time, it is nearly two

years now that has gone by, and I think that is a matter that the Court will have to deal with in making up the findings.

The Court: I think not. I think that is a matter for the tax-collecting officers and not for the Court.

Mr. Phelps: Well, your Honor, would judgment have to 151
be entered on the findings the Court makes?

The Court: Yes, but it would not be a judgment that would relate back to the time the tax became due, and would not bar the penalty if it should have been paid at that time. Of course, unless the effect of the finding, when it is made, should be to change the number of cords by reducing them and consequently change the valuation, unless the effect of that will be to relieve the defendant from the penalty, why the penalty will obtain and there will be no way of stopping it.

Mr. Nye: But, if the Court please, if the finding would 152
simply indicate the tax, and would not make any finding on the judgment or penalty?

The Court: I think it could be done either way: Treat it as of the present time and make it with regard to the penalty and tax, or treat it as a matter of the time of judgment and have it taken up from that time.

Mr. Nye: I want the record to show that our position is that the penalty should not be paid in case there is a reduction.

153

Mr. Phelps: It will have to be determined some way or other, I suppose, and if it is not determined in this proceedings we will probably have to have another one.

The Court: That might be. It might be well to have it determined.

Mr. Phelps: Yes. If the Court could determine or would settle that question it might save a lot of time and trouble for counsel and the Court, too.

The Court: Have you gentlemen looked up the law on
154 that?

Mr. Nye: No, but if the Court wishes authorities, I would be glad to submit them.

The Court: I take it that it is true that unless a reduction of the valuation operates to suspend the running of the penalty then the penalty runs and there is no way of stopping it.

Mr. Nye: I think that is true.

The Court: I think I can advise you now, gentlemen,
155 that the finding will be made as to a change in the number of cords, and that instead of being 10,000 cords it will be 8,367 cords.

Mr. Nye: What was your Honor's figure?

The Court: 8,367.

Mr. Nye: I got 8,478. I do not know whether I have figured it correctly.

The Court: It is 8,367.

Mr. Nye: Yes.
156 The Court: And that multiplied by 7 and divided by 3 will give the valuation for assessment purposes.

Mr. Phelps: I think then there is nothing else now except that one question as to whether or not the penalty attaches.

The Court: Yes.

Mr. Phelps: And if Mr. Nye wishes to submit authorities on it, that will be satisfactory. I would like to have that determined in connection with this amendment.

The Court: All right.

Mr. Nye: Yes, I think we would, too. 157

Mr. Phelps: How long a time would you want? I wish you would be as brief as you can.

Mr. Nye: Yes, we will be as brief as possible; a week or 10 days.

Mr. Phelps: That is all right, and I will answer within 10 days.

The Court: Then the findings will be amended in one other respect, and that will be with respect to the review of the matter and the change that was made by the assessing officers. I think I made a statement in the findings that that was done by the county board; it will be that that was done by the proper tax officers of the county. And when we reach the proposition I think I will ask one of you gentlemen to draw the amended findings. 158

Mr. Phelps: Well, I did not ask for any amended findings.

Mr. Nye: All right, I have the figures and I think we can draw them. 159

(Same Title)

STIPULATION

160 In the Matter of the Personal Property Taxes levied against Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota.

IT IS STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the foregoing additional transcript consisting of 15 pages of typewritten matter, contains all the evidence offered or received on the supplemental hearing in the above matter held on March 1, 1924, and also all objections, rulings and other proceedings, and that the above named court may allow the same as and for a part of the settled case herein.

161

H. H. PHELPS,
Attorney for Plaintiff.
WASHBURN, BAILEY & MITCHELL,
Attorneys for defendant,

(Same Title)

In the Matter of the Personal Property Taxes levied against
162 Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota.

I HEREBY CERTIFY that the foregoing additional transcript consisting of 15 pages of typewritten matter, has been examined by me and found conformable to the truth and to contain all the evidence offered or received at a supplemental hearing held in the above matter, and all objections and

rulings thereon, and all other proceedings; and the same is allowed as and for a part of the settled case herein.

Dated April 17, 1924.

MARTIN HUGHES,
District Judge.

163

(Same Title)

FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER FOR JUDGMENT.

The above entitled action being regularly on the calendar for the general June, 1923, term of the above named court, came duly on for trial at Grand Marais, in said county, on the 19th day of June, 1923, Messrs. S. C. Murphy and H. H. Phelps appearing as attorneys for the plaintiff and Messrs. 164
Washburn, Bailey & Mitchell, by Mr. H. A. Carmichael, appearing as attorneys for the defendant. Having duly considered the evidence and briefs of counsel and being advised in the premises the court makes and files its findings of fact, conclusions of law and order for judgment, as follows, to-wit:

FINDINGS OF FACT

1. That the answering defendant, Hughes Bros. Timber 165
Company, is a co-partnership consisting of Francis J. Dacey, Thomas H. Hughes, D. J. Arpin and George J. Hughes.

2. That on the 31st day of October, 1921, the said answering defendant entered into a contract in writing with the Central Paper Company of Muskegon, Michigan, under and by the terms of which the said defendant agreed to de-

liver to the said Paper Company over the rail of vessel and stowed at Pigeon Bay at the mouth of Pigeon River approximately 10,000 cords of pulpwood, and to load the same in boats furnished by the Paper Company for such purpose, and stow same away on such boats as promptly and expeditiously
166 as possible after their arrival, said Timber Company to be responsible for demurrage caused through their default. Under said contract it was the duty of said Timber Company to furnish all labor and equipment necessary for the loading and storing of said timber on boats. Said contract further provided that the wood should be scaled and measured by a representative of both parties when first cargo was loaded and on arrival at Muskegon, Michigan, and that the Paper Company should pay the balance due on each cargo of wood within five days after delivery at Muskegon, measurement at Muskegon to be the basis for final settlement. The said Paper Company
167 agreed in said contract to pay for said wood as finally scaled, measured, delivered and accepted at Muskegon, $12.00 American funds f. o. b. vessel. In said contract the said Paper Company agreed to make progress estimates during the months of January, February and March at river landings, and to advance $3.00 per cord for all wood inspected and measured. Said contract further provided that title to wood on which advances were made should be in the name of the Paper Company and be branded at time of provisional inspection and measurement. Said contract further provided that the Paper Company should pay an additional $3.00 per
168 cord when the wood was delivered in booms at the point of loading on Pigeon Bay and the balance of $6.00 per cord within five days after delivery at Muskegon. The said contract required liability insurance to be carried by said Timber Com pany and cargo insurance to be carried by the Paper Company.

3. That pursuant to said contract the said Timber Com-

pany cut from standing timber in the Town of Hovland, in said county, and thereabouts, in the winter of 1921 and 1922, pulpwood, and piled a portion of the same upon the ice and the remainder upon the bank of Swamp River, which is a tributary to Pigeon River, which empties into Pigeon Bay, and which with Pigeon Bay forms part of the international boundary line between the State of Minnesota and the Province of Ontario, Canada. 169

4. That the assessor of the said Town of Hovland assessed as of the first day of May, 1922, to the Timber Company 1,500 cords of pulpwood, which assessment was thereafter regularly and duly raised by the Board of County Commissioners to 10,000 cords.

5. That all of the timber so cut and piled on the ice and on the bank of Swamp River was floated down the said Swamp River and Pigeon River to Pigeon Bay, the point at which under the contract it was to be delivered to the Paper Company upon boats. That the floating of said timber commenced on the 29th day of April, 1922, and on the first day of May thereafter all of said timber was in said Pigeon River being floated down to Pigeon Bay, where same was boomed to await the opening of navigation and the arrival of boats to transport the same to Muskegon, Michigan. That the total number of cords which arrived at Muskegon, Michigan, and which the Timber Company furnished to the Paper Company under said contract was 7,531. 170

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6. That it was not the intention of the parties that the absolute title to said timber should be transferred to the Paper Company at the time any advances on the purchase price thereof was made, and that the provision in said contract that the title should be in the name of the Paper Company was simply for the protection of the Paper Company for the money it had advanced, but that under said contract the title to the

said wood remained in the Timber Company until final delivery was made to the Paper Company.

7. That the floating of said timber down the Swamp and Pigeon Rivers and into Pigeon Bay was no part of an interstate journey, but was done for the purpose of collecting
172 the said timber at the point in Pigeon Bay where delivery was to be made to the Paper Company upon boats.

AS CONCLUSIONS OF LAW

That the plaintiff is entitled to judgment that the said Hughes Bros. Timber Company was the owner of the pulpwood at the time the same was assessed to it, to-wit: May 1,
173 1923, and that at said time no part of said timber had become an interstate shipment nor had begun an interstate journey, and sustaining the tax and penalties, and for the costs and disbursements of this action.

Let judgment be entered accordingly.

Further proceedings on the part of the plaintiff are stayed for a period of twenty days from and after the date of mailing of notice by the clerk to defendant's counsel of the filing of these findings in his office.

174 Dated at Hibbing, Minnesota, August 24th, 1923.

By the Court,
MARTIN HUGHES,
Judge.

Mem.

The defendant claims that the timber in question was not properly assessable to it for two reasons: 1st. That it was not its property on May 1, 1922, and 2nd. That if it was its property it had started on an interstate journey at said time. 175

I take it it is quite clear from the reading of the contract that notwithstanding the provision with reference to title passing upon making progress payments that the title to the wood remained in the defendant until delivery thereof was actually made. The whole contract must be taken together in determining the intention of the parties, and taking the contract as a whole, I conclude that such is its meaning.

The defendant claims that this case is controlled by the Hammermill Paper Company case. I am unable to agree with that contention. The rule seems to be well settled that where timber is delivered to a carrier, billed to a purchaser in another state, and where owing to natural causes its progress is interrupted and delay is caused that it becomes part of an interstate shipment from the time of its delivery to such carrier and that mere delay caused by natural causes does not destroy its interstate character. The rule is equally well settled that where timber, such as this is, is to be delivered at a certain place to the purchaser, and where the one agreeing to furnish the timber is engaged in performing his contract up to the time of delivery and while so doing transports such timber to the point of delivery, such shipment has no interstate character. In the Hammermill case the wood that was hauled in on sleds to the point of shipment upon boats was held taxable. If the defendant here hauled the timber to Pigeon Bay on sleds no question could be made that it was properly taxable in Minnesota. If it is not so taxable, then the mere floating of 176 177

the timber down Pigeon River must have destroyed its taxable character. There is no reason why it should. Pigeon River is merely a highway, and the transporting of the timber by floating it over such highway could not operate to change its taxable character any more than hauling it by sleighs over any
178 highway would do so.

(Same Title)

To H. H. Phelps, Esquire, and S. C. Murphy, Esquire, Attorneys for the above named plaintiff:

SIRS:

YOU WILL PLEASE TAKE NOTICE that at Chambers
179 of the above named Court in the County Court House in the Village of Hibbing, Minnesota, on the 20th day of October, 1923, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, Hughes Bros. Timber Company, defendant, will move the Court in the above entitled action for an order amending the Findings of Fact, Conclusions of Law and Order for Judgment heretofore filed as follows: said motion being made separately as to each requested amendment.

I.

By striking out the fourth Finding of Fact.

180

II.

In the event that the Court does not strike out the fourth Finding of Fact, that the Court strike out the following therefrom: "which assessment was thereafter regularly and duly raised by the Board of County Commissioners to 10,000 cords."

III.

By striking out the sixth Finding of Fact.

IV.

By striking out the seventh Finding of Fact.

181

V.

That the Court make an additional Finding of Fact as follows:

"That the defendant herein did not have in its possession on May 1, 1922, any pulpwood in excess of 7,531 cords."

VI.

That the Court make an additional Finding of Fact as follows:

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"That said pulpwood so assessed was never at any time destined for any other place than Muskegon, Michigan, and before any assessment of said pulpwood was made by the taxing officials of Hovland Township, or Cook County, Minnesota, said pulpwood was in process of transportation and had entered upon an interstate journey from the place where the same was cut in Hovland Township to Muskegon, Michigan, and said pulpwood was in process of transportation from the place where the same was cut in Minnesota to Muskegon, Michigan, on May 1, 1922, and had no taxable situs in Minnesota."

VII.

183

That the Court make an additional Finding of Fact as follows:

"That said pulpwood on May 1, 1922 was not in the Town of Hovland, Cook County, Minnesota."

VIII.

That the Court make an additional Finding of Fact as follows:

"That the true and full value of said pulpwood did not exceed $7.00 per cord."

That on May 1, 1922, all of said pulpwood consisting of 7,531 cords was afloat on Pigeon River which comprises the boundary waters between the United States and the Dominion
184 of Canada.

The the Court frame Conclusions of Law and Order for Judgment in accordance with the Findings of Fact as amended.

WASHBURN, BAILEY & MITCHELL,
Attorneys for defendant,
1200 Alworth Building,
Duluth, Minnesota.

185

(Same Title)

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER FOR JUDGMENT

The above entitled action being regularly on the calendar for the General June, 1923, term of the above named court, came duly on for trial at Grand Marais, in said county, on the 19th day of June, 1923, Messrs. S. C. Murphy and H. H. Phelps appearing as attorneys for the plaintiff, and Messrs.
186 Washburn, Bailey & Mitchell, by Mr. H. A. Carmichael, appearing as attorneys for the defendant; and pursuant to agreement between counsel for the respective parties herein, said action having come on for further hearing in the Court House in the Village of Hibbing, St. Louis County, Minnesota, on March 1, 1924, Mr. H. H. Phelps appearing as attorney for the plaintiff and Messrs. Washburn, Bailey & Mitchell, by Mr. James G. Nye, appearing as attorneys for the defendant.

Having duly considered the evidence and briefs of counsel and being advised in the premises the court makes and files its Amended Findings of Fact, Conclusions of Law and Order for Judgment, as follows, to-wit:

187

FINDINGS OF FACT

1. That the answering defendant, Hughes Bros. Timber Company, is a co-partnership consisting of Francis J. Dacey, Thomas H. Hughes, D. J. Arpin and George J. Hughes.

2. That on the 31st day of October, 1921, the said answering defendant entered into a contract in writing with the Central Paper Company of Muskegon, Michigan, under and by the terms of which the said defendant agreed to deliver to the said Paper Company over the rail of vessel and stowed at Pigeon Bay at the mouth of Pigeon River approximately 10,000 cords of pulpwood, and to load the same in boats furnished by the Paper Company for such purpose, and stow same away on such boats as promptly and expeditiously as possible after their arrival, said Timber Company to be responsible for demurrage caused through their default. Under said contract it was the duty of said Timber Company to furnish all labor and equipment necessary for the loading and storing of said timber on boats. Said contract further provided that the wood should be scaled and measured by a representative of both parties when first cargo was loaded and on arrival at Muskegon, Michigan, and that the Paper Company should pay the balance due on each cargo of wood within five days after delivery at Muskegon, the measurement at Muskegon to be the basis for final settlement. The said Paper Company agreed in said contract to pay for said wood as finally scaled, measured, delivered and accepted at Muskegon, $12.00 American funds f. o. b. vessel. In said contract the

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said Paper Company agreed to make progress estimates during the months of January, February and March at river landings, and to advance $3.00 per cord for all wood inspected and measured. Said contract further provided that title to wood on which advances were made should be in the name
190 of the Paper Company and be branded at time of provisional inspection and measurement. Said contract further provided that the Paper Company should pay an additional $3.00 per cord when the wood was delivered in booms at the point of loading on Pigeon Bay and the balance of $6.00 per cord within five days after delivery at Muskegon. The said contract required liability insurance to be carried by said Timber Company and cargo insurance to be carried by the Paper Company.

3. That pursuant to said contract the said Timber Com-
191 pany cut from standing timber in the Town of Hovland, in said county, and thereabouts, in the winter of 1921 and 1922, pulpwood, and piled a portion of the same upon the ice and the remainder upon the bank of Swamp River, which is a tributary to Pigeon River, which empties into Pigeon Bay, and which with Pigeon Bay forms part of the international boundary line between the State of Minnesota and the Province of Ontario, Canada.

4. That the assessor of the said Town of Hovland assessed as of the first day of May, 1922, to the Timber Company 1,500 cords of pulpwood, which assessment was there-
192 after regularly and duly raised by the Boards of Review and Equalization to 10,000 cords.

5. That in fact the defendant cut and piled on the bank of the Swamp River, not to exceed 8,367 cords of pulpwood prior to the 29th day of April, 1922.

6. That all of the timber so cut and piled on the ice and

on the bank of Swamp River was floated down the said Swamp River and Pigeon River to Pigeon Bay, the point at which under the contract it was to be delivered to the Paper Company upon boats. That the floating of said timber commenced on the 29th day of April, 1922, and on the first day of May thereafter all of said timber was in said Pigeon River being 193
floated down to Pigeon Bay, where same was boomed to await the opening of navigation and the arrival of boats to transport the same to Muskegon, Michigan. That the total number of cords which arrived at Muskegon, Michigan, and which the Timber Company furnished to the Paper Company under said contract was 7,531.

7. That it was not the intention of the parties that the absolute title to said timber should be transferred to the Paper Company at the time any advances on the purchase price thereof were made, and that the provision in said contract 194
that the title should be in the name of the Paper Company was simply for the protection of the Paper Company for the money it had advanced, but that under said contract the title to the said wood remained in the Timber Company until final delivery was made to the Paper Company.

8. That the floating of said timber down the Swamp and Pigeon Rivers and into Pigeon Bay was no part of an interstate journey, but was done for the purpose of collecting the said timber at the point in Pigeon Bay where delivery was to be made to the Paper Company upon boats.

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AS CONCLUSIONS OF LAW

That plaintiff is entitled to judgment that the said Hughes Bros. Timber Company was the owner of 8,367 cords of pulpwood at the time the same was assessed to it, to-wit

May 1, 1922, and that at said time no part of said timber had become an article in Interstate Commerce or had begun an Interstate journey, and sustaining the tax as to 8,367 cords of pulpwood, said tax together with the tax on other personal property referred to in the answer herein amounting to $2,-
196 233.44, and a penalty of ten per cent thereon and interest at the rate of one per cent per month from April 1, 1923, and for the costs and disbursements of this action.

Let judgment be entered accordingly.

Dated at Hibbing, Minnesota, April 17, 1924.

By the Court,

MARTIN HUGHES,
Judge.

197

(Same Title)

JUDGMENT

In the Matter of the Personal Property Taxes levied against Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota.

The above entitled matter having been regularly on the calendar of the general June term of the above named Court and having come on for trial before the Court without a jury,
198 Messrs. S. C. Murphy and H. H. Phelps having appeared as attorneys for plaintiff and Messrs. Washburn, Bailey & Mitchell by H. A. Carmichael having appeared as attorneys for the defendants and the Court having heard the testimony of the respective parties and the arguments of counsel and having thereafter made its findings of fact and conclusions of law and subsequently, upon further hearing, having made

and filed amended findings of fact, conclusions of law and order for judgment wherein it is ordered and directed that judgment be entered in favor of plaintiff, The State of Minnesota, and against the Defendants, for the sum of Two Thousand Two Hundred and Thirty-three and 44/100 Dollars, together with a penalty of ten per cent thereon and interest at the rate of one per cent per month from April 1, 1923, and for the costs and disbursements of the action; and the plaintiff's costs and disbursements having been taxed and allowed at Ten Dollars. 199

NOW THEREFORE, On motion of S. C. Murphy, one of the attorneys for plaintiff, and county attorney of said county, and pursuant to the amended findings and order of the Court for judgment, aforesaid, it is hereby adjudged and decreed that the plaintiff recover from the defendants and each of them the sum of Two Thousand Two Hundred and Thirty-three and 44/100 Dollars, together with Two Hundred and Twenty-three and 34/100 Dollars penalty and interest at one per cent per month from April 1, 1923, amounting to Three Hundred Twenty-nine and 19/100 Dollars and Ten Dollars costs and disbursements or a total sum of Two Thousand Seven Hundred and Ninety-five and 97/100 Dollars. 200

Witness, The Honorable Martin Hughes, Judge of said Court at Grand Marais, Minnesota, this 12th day of May, 1924.

MATT JOHNSON,

Clerk of District Court of
Cook County, Minnesota. 201

(Seal)

(Same Title)

NOTICE OF APPEAL

In the Matter of the Personal Property Taxes Levied
202 against Hughes Bros. Timber Company for the year 1922 in the Town of Hovland, Cook County, Minnesota.

To H. H. Phelps, Esq., and S. C. Murphy, Esq., attorneys for the above named plaintiff, and Matt Johnson, clerk of the above named court:

You and each of you are hereby notified that the defendant appeals to the Supreme Court of the State of Minnesota from the judgment of the above named District Court entered in the above entitled action on the 12th day of May, 1924, in favor of plaintiff.

203 Dated September 6th, 1924.

WASHBURN, BAILEY & MITCHELL,
Attorneys for Defendant.

Service on the foregoing notice was admitted.
Proper cost and supersedeas bond was filed.

STATE OF MINNESOTA)
)ss.
204 Supreme Court)

I, Grace F. Kaercher, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the foregoing paper writing with the original Record in the cause entitled State of Minnesota, Plaintiff-Respondent, vs. Hughes Bros. Timber Company, a co-partnership, Defendant-Appellant, now remaining on file in said ac-

tion, and that the same is a true and correct copy of said original and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at the Capitol in the City of Saint Paul, Minnesota, this 20th day of July, A. D. 1925. 205

GRACE F. KAERCHER,
Clerk of Supreme Court.
By PETER O. SCOW,
Deputy Clerk.

(Seal)
Endorsed
Filed April 17th, 1925.
Grace F. Kaercher, Clerk.

206

24445

STATE OF MINNESOTA,
Plaintiff-Respondent,
vs.
HUGHES BROS. TIMBER COMPANY,
Defendant-Appellants.

SYLLABUS

1. Pulpwood cut during the winter in the adjacent forests of Cook County, Minnesota, afloat in the Pigeon River on May 1st and on its way to the booms in Pigeon Bay on Lake Superior, there to await the opening of navigation and the arrival of boats to transport it to its final destination in another state, had not begun its final journey to the latter point so as to become an article of interstate commerce to the extent that it was not taxable as of May 1st in Minnesota. 207

2. Under such circumstances an advance of $3.00 a cord by the purchaser with a simultaneous passing of the title did not so far deprive the seller of ownership as to make him immune from taxation on account of the goods in question for he was still interested to the extent that three-fourths of the purchase price remained to be paid and the last half was not payable or determinable until the wood was "finally delivered, scaled, measured and accepted."

3. A taxpayer against whom has been assessed an excessive personal property tax, and who by interposing an answer and litigating the issue has the tax reduced, is liable only for interest from the date of the order for judgment. Not having opportunity earlier to pay the correct amount, there has been no default in payment and consequently no justification for the imposition of the statutory interest and penalties.

Modified.

OPINION

Defendant appeals from a judgment confirming a 1922 personal property tax on account of 8,367 cords of pulpwood, the assessment having been made in the town of Hoyland, Cook County. The tax was resisted solely by the claim that the pulpwood, before May 1st, 1922, had entered the channels of interstate commerce on its way to a destination in another state.

On October 31st, 1921, defendant contracted with the Central Paper Company of Muskegon, Michigan, to deliver 10,000 cords of pulpwood "during the season of 1922, delivery to be made "over rail of vessel" and stowed at Pigeon Bay, on boats to be furnished by the purchaser. The contract obli-

gated the Paper Company to advance $3.00 per cord during the winter months upon progress estimates of quantities at the river landings, where the wood was to be provisionally inspected and measured. Title to wood on which the advance was made was thereupon to pass and the wood to be branded accordingly at that time. Another advance of $3.00 per cord was required upon arrival of the wood in the booms on Pigeon Bay. The balance was not payable nor determinable until the wood was "finally scaled and measured, delivered and accepted" at Muskegon.

Pigeon River is on the international boundary between Cook County and the Province of Ontario and flows into Lake Superior at Pigeon Bay. The pulpwood had been cut in nearby forests of Cook County and on April 29th, 1922, was all piled on the ice and banks of the Swamp River, a Minnesota tributary of the Pigeon. By May 1st, it was all afloat and on its way to the booms in the Bay, there to await the opening of navigation and the arrival of the boats on which to make the final journey to Muskegon.

1. We are thus required to pass upon a federal question and are controlled by Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 715, followed in State vs. Taber Lumber Co., 101 Minn. 186; State vs. Burlington Lumber Co., 118 Minn. 329, and State vs. Hammermill Paper Co., 149 Minn. 414. The attempt to tax this pulpwood is in no way referable to its intended shipment out of the state but was in the usual manner in which all such personal property is taxed under our statute. In that situation, Coe vs. Errol, as we understand it, sustains the tax and might even though the assessment had been made on the pulpwood after it had reached and while still in the booms at Pigeon Bay. It would then have been "deposited or stored at the place of entrepot for future exportation" and the taxability of such property is "plain", if it is "not singled out to be assessed

by itself in an unusual and exceptional manner because of its destination". Such a tax is valid for it affects what "is still a part of the general mass of property in the state."

That character is not lost, under the principle of Coe vs. Erroll, while the goods are being carried in "carts or other vehicles", nor even while being floated "to the depot where the journey is to commence. * * * That is all preliminary work, * * * only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it in a course of exportation; it is no part of the exportation itself."

So it was held in the controlling case that saw logs partially prepared for export from New Hampshire and which had been floated to and deposited at the place or port of shipment, within that state, were liable to be taxed therein. See also Johnson vs. Bradley-Watkins Tie Co., 120 Ky. 136, where it was held that ties then recently cut in Kentucky and piled on a river bank for the purpose when a boat was secured of being shipped out of the state, were taxable in Kentucky. Saw logs were again involved in Diamond Match Co. vs. Village of Ontonagon, 188 U. S. 82, 47 L. Ed. 394. The facts were somewhat stronger for taxation there than they are here. The controlling principles, however, were the same and Coe vs. Erroll was applied as the ruling case. It was considered to have been established that, for the purpose of taxation of personal property, particularly its own products, intended for exportation out of the state, "there may be an interior movement * * * which does not constitute interstate commerce, though property come from or be destined to another state. In the one case, though it has not reached its place of disembarkation or delivery, it may be taxed. * * * In the other case, until it be shipped or started on its final journey it may be taxed." In that case the tax was imposed under a Michigan statute providing for the taxation of forest prod-

ucts of that state in transit to a point outside the state and giving them a situs for taxation at the place nearest to the last boom or sorting gap of the stream in which they would be last floated during such transit. The tax now involved is imposed under a similar statute. Sec. 2005, G. S. 1923, provides that "logs and timber cut from lands within, and designed to be transported out of, this state shall be assessed and taxed in the taxing district where found on May 1st." We sustain the tax because, while the logs were in process of transportation, the movement was an interior one and in preparation for and not a part of the final and interstate movement.

Reference to our own decisions, none having been brought to our attention other than those cited, fortifies our conclusion. For example, the saw logs involved in State vs. Taber Lumber Company were not considered to have entered the channels of inter-state commerce simply because they were going through a sluicing operation intended to get them to the hoist which would put them on their final railroad journey out of the state. The logs involved in State vs. Burlington Lumber Company occupied, relatively, about the same position this pulpwood would have been in at the booms in Pigeon Bay. They were well on their way, in fact brailed in the Mississippi below St. Paul and actually awaiting the boats to take them on their final journey out of the state. They were held taxable. The Hammermill Paper Company case is to the same effect although for the most part an opposite result was reached. The bulk of the wood there involved was already in the hands of an interstate carrier and actually billed out of the state under interstate rates. It was in a very different situation from that now under consideration and was held not taxable. Involved in that case also was a quantity of wood "hauled in on sleds" and stored with the other, but, unlike the latter, its

final journey out of the state had not begun and it was held taxable.

The facts in Kelly vs. Rhoads, 188 U. S. 1, 47 L. Ed. 359, were very different from those now in question. The State of Wyoming attempted to tax a drove of sheep bound overland from Utah to Nebraska by a direct route across Wyoming. They were in interstate commerce and that character attended them across the Nebraska boundary. The bare statement of the case shows how different it is from this one.

It is not easy to determine in every case just where a movement of goods intended for interstate or foreign commerce takes on that character. That inherent difficulty is especially apparent from a comparison of Coe vs. Errol, supra, involving the right of a state to tax such property, or rather to tax the owner on account of it, with the cases involving an attempt of the exporting state to burden the movement of such goods by discriminatory rates for transportation or by direct regulation of an interstate carrier. The latter type of cases is illustrated by Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U. S. 498, 55 L. Ed. 310; Ohio Railroad Commission vs. Worthington, 225 U. S. 101, 56 L. Ed. 1004; Texas & New Orleans R. R. Co. vs. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, and Louisiana Railroad Commission vs. Texas & Pacific Railway Co., 229 U. S. 336, 57 L. Ed. 1215. In those cases what was considered the initial movement of interstate or foreign commerce was very similar to that which in Coe vs. Errol was held to be interior, preliminary to and no part of the interstate movement. A possible distinction is that in the last cases cited the exercise of state authority was considered a direct interference with and burden upon the movement of goods in interstate commerce, whereas in the tax cases there was no attempt whatsoever to interfere with or burden the movement of goods

but only an effort to tax property owners because of their ownership of goods.

It is not, primarily, a purpose of the commerce clause to prevent state taxation of any property. "A state tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce." Underwood Typewriter Co. vs. Chamberlain, 254 U. S. 113, 65 L. Ed. 165. The tax in such a case is invalid only when it becomes a burden upon federal commerce or an intrusion upon the domain of national regulation. A transportation rate or a regulation of an interstate carrier frequently has a direct and immediate burdening or regulating effect upon commerce itself, the movement of persons or goods, not possessed by a tax against the owners of the subjects or instruments of commerce.

2. The fact that the Michigan purchaser, by advancing $3.00 a cord on the purchase price, acquired the property in the wood, as provided by the contract, is not overlooked. Even if the transfer of ownership had been absolute it would not have deprived the state, nothing else appearing, of the right to tax. It could not make interstate commerce of a movement which otherwise did not have that character. In this connection, we have been attentive also to the argument that, aside from the interstate commerce question, the defendant had so far parted with the property that it could not be taxed therefor on May 1st, 1922. We hold to the contrary. There had been no delivery to the purchaser. The cash advance under the contract did not deprive defendants of the control and right to possession of the pulpwood. Three-fourths of the purchase price remained to be paid. Another $3.00 per cord was payable upon arrival of the wood in the booms at Pigeon Bay. The balance, $6.00 per cord, was not payable or determinable until final measurement and acceptance at Muskegon. These circumstances make it clear that the defendants had not

so far parted with their property as to be immune from taxation on its account. A tax on property is not defeated merely by selling it for future delivery and procuring an advance on the purchase price.

3. The original assessment was on 10,000 cords but in fact there were only 6,387 cords. The tax was reduced accordingly by the decision below, but, notwithstanding, the statutory interest and penalties were sustained as to the reduced amount. In that we think there was error. Under the principle of County of Redwood vs. Winona & St. Peter Land Co., 40 Minn. 512, neither interest nor penalties can be imposed upon the taxpayer until he defaults in payment. Defendants had no opportunity to pay the correct amount of the tax until it was determined. Until then they were not in default, so all they can be held for is interest on the tax from the time it was so determined.

The argument contra insists that the failure of defendants to list their pulpwood for taxation was such a default as to justify the imposition of both interest and penalties. We do not agree for notwithstanding their failure in that respect it was the duty of the assessor not to fix the tax at an excessive amount. When he did so, there was no obligation upon defendants to pay the excessive tax. We are now concerned with default in payment and there was no such default until the correct amount was ascertained and that was not until the filing of the order for judgment.

The judgment should be modified by striking therefrom the provisions allowing interest and penalties and substituting therefor an allowance of interest only on the tax as corrected and from the date of the order for judgment. When so modified, the judgment will stand affirmed. There will be no allowance of statutory costs.

Remanded for a modification of the judgment in accordance with the foregoing.

STONE, J.

STATE OF MINNESOTA)
)ss.
Supreme Court)

I, Grace F. Kaercher, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the foregoing paper writing with the original Syllabus and Opinion in the cause entitled State of Minnesota vs. Hughes Bros. Timber Co., now remaining file in said action, and that the same is a true and correct copy of said original and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at the Capitol in the City of Saint Paul, Minnesota, this 21st day of July, A. D. 1925.

GRACE F. KAERCHER,
Clerk of Supreme Court,
By PETER O. SCOW,
Deputy Clerk.

(Seal)

STATE OF MINNESOTA,

Respondent,

vs.

FRANCIS J. DACEY, THOMAS H. HUGHES, D. J. ARPIN and GEORGE H. HUGHES, co-partners doing business as Hughes Brothers Timber Company,

Appellants.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Cook, be and the same hereby is in all things remanded for a modification of the judgment in accordance with the opinion filed herein..

Dated and signed May 19th, A. D. 1925.

BY THE COURT.
Attest,
Grace F. Kaercher, Clerk.

(Seal)
Filed May 19th, 1925.
Grace F. Kaercher, Clerk.

STATE OF MINNESOTA)
)ss.
Supreme Court)

I, Grace F. Kaercher, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the foregoing paper writing with the original Judgment in the cause entitled State of Minnesota vs. Francis Dacey, et al, now remaining of record in said action, and that the same is a true and correct copy of said original and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at the Capitol in the City of Saint Paul, Minnesota, this 21st day of July, A. D. 1925.

GRACE F. KAERCHER,
Clerk of Supreme Court.

By PETER O. SCOW,
Deputy Clerk.

(Seal)

IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8567)

Office Supreme Court, U. S.
FILED
JUL 16 1925
WM. R. STANSBURY

No. 6[redacted] 170

In the Supreme Court of the United States

HUGHES BROS. TIMBER COMPANY, A CO-PARTNERSHIP, PETITIONER,

vs.

STATE OF MINNESOTA, RESPONDENT.

Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota and Brief in Support Thereof.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

In the Supreme Court of the United States

HUGHES BROS. TIMBER COMPANY,
a Co-partnership,
Petitioner,
vs.
STATE OF MINNESOTA,
Respondent.
No.....

Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota and Brief in Support Thereof.

To THE HONORABLE WILLIAM HOWARD TAFT, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States, and to the Honorable the Supreme Court of the United States.

The petition of Hughes Bros. Timber Company, a co-partnership, consisting of Francis J. Dacey, D. J. Arpin, Thomas H. Hughes and George J. Hughes, all being residents of the State of Minnesota, respectfully shows:

1. That on or about the 1st day of April, 1923, an action was commenced in the District Court, Eleventh Judicial District, County of Cook, State of Minnesota, by the State of Minnesota against petitioners, seeking to recover a personal property tax levied and assessed against petitioners, in the amount of $2,654.09, and in addition thereto, certain penalties, the claim being made by the State of Minnesota that on May 1st, 1922, peti-

tioners owned certain pulpwood in Cook County, Minnesota, for which petitioners were liable to pay a tax.

2. That the Statutes of Minnesota in force at the time and particularly Section 1979, General Statutes of Minnesota for the year 1913, provides that:

> "Personal property shall be listed and assessed annually, with reference to its value on May 1st, and, if acquired on that day, shall be listed by and for the person acquiring it."

3. That petitioners interposed answer to said tax proceeding, and among other things alleged that the pulpwood in question had been cut by them during the logging season of the year 1921-1922, and was piled on the ice on streams tributary to Pigeon River, Pigeon River forming a part of the international boundary between the United States of America and the Dominion of Canada, and particularly between a portion of the State of Minnesota and a portion of the Province of Ontario. That all of said pulpwood had previously been sold to a party outside the State of Minnesota, and that on May 1st, 1922, all of said pulpwood was in process of transportation down the Pigeon River on a continuous journey to Muskegon, Michigan, the place of residence of the purchaser, and was to be and was loaded into boats at the mouth of Pigeon River as soon as boats arrived, and was transported to Muskegon, Michigan.

4. The answer of petitioners in said proceeding set forth that on May 1st, 1922, the time when said tax was attempted to be levied and assessed, the pulpwood referred to was in actual transit in a continuous route

or journey from the State of Minnesota to another state, and that said pulpwood had no situs whatever in the State of Minnesota for taxation, and further, that said tax was a burden upon interstate commerce, attempted to be placed thereon contrary to the Constitution and Laws of the United States.

5. Thereafter, said case proceeded to trial on June 19th, 1923, and the trial court held that petitioners were liable to pay the tax, notwithstanding the fact that the trial court found that:

> "The floating of said timber commenced on the 29th day of April, 1922, and on the 1st day of May thereafter, all of said timber was in said Pigeon River, being floated down to Pigeon Bay, where same was boomed to await the opening of navigation and the arrival of boats to transport the same to Muskegon, Michigan." (See Fol. 198 of Record filed in Supreme Court of State of Minnesota).

6. Thereafter, petitioners appealed to the Supreme Court of the State of Minnesota, and the Supreme Court of the State of Minnesota, by decree filed April 17th, 1925, sustained the order for judgment entered by the Lower Court, to the effect that petitioners were liable to pay such tax.

7. The claim of petitioners is that the taxes so levied and assessed are in violation of and repugnant to that part of Section 8 of Article I of the Constitution of the United States which provides that

> "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states,"

in that such tax burdens and interferes with interstate commerce and Section 10 of Article I, which provides that

> "No state shall, without the consent of Congress, lay any imposts or duties upon imports or exports except what may be absolutely necessary for executing the inspection laws."

Further, that the decree complained of violates the second rule announced by this Court in the case of *Coe vs. Errol*, 116 U. S. 517. This Court, in determining when personal property was not taxable by a state, said as follows:

> "Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been
>
> (1) *Shipped or entered with a common carrier for transportation to another state;*
>
> or
>
> (2) *Have been started upon such transportation in a continuous route or journey.*"

Further, that the degree complained of is not consistent with the decision of the Supreme Court of Minnesota in the case of *State vs. Hammermill Paper Company*, 149 Minn. 414.

8. The specific question presented is whether pulpwood which on May 1st, 1922, was being floated down the Pigeon River, forming a part of the International boundary between United States and the Dominion of Can-

ada, having started on its journey to Muskegon, Michigan, and was loaded on vessels as soon as possible after its arrival at the mouth of the Pigeon River and transported to Muskegon, Michigan, was taxable by the State of Minnesota.

9. Petitioners contend that the Supreme Court of Minnesota by its decree of April 17th, 1925, has disregarded and refused to follow the fundamental principles announced by this Court in the case of *Coe vs. Errol*, 116 U. S. 517, and that the tax levied is in violation of Section 8 of Article I, and Section 10 of Article I of the Constitution of the United States.

THEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the decree of the Supreme Court of the State of Minnesota should be granted.

OSCAR MITCHELL
and
W. D. BAILEY,

Solicitors for Petitioners.

STATE OF MINNESOTA)
)ss.
COUNTY OF ST. LOUIS)

Francis J. Dacey, being duly sworn, deposes and says: I am one of the foregoing petitioners. The foregoing petition is true to my knowledge, except as to those

matters therein stated upon information and belief; and as to those matters, I believe the same to be true.

FRANCIS J. DACEY.

Subscribed and sworn to before
me this 14th day of July, 1925.

H. A. CARMICHAEL,

H. A. CARMICHAEL,

Notary Public, St. Louis County, Minnesota.
My Commission expires May 10th, 1931.

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BRIEF IN SUPPORT OF PETITION

The petitioners contend that the pulpwood on May 1st, 1922, was an article of interstate commerce and therefore not taxable by the State of Minnesota.

A certified copy of the entire transcript of the record of the case is attached to the original petition, and we will refer to the record used before the Supreme Court of the State of Minnesota by folio numbers in this brief in support of the petition.

In the winter of 1921-22 petitioners engaged in cutting the pulpwood from land in Cook County, Minnesota. The pulpwood was piled on the ice and banks of the Swamp River, it being tributary to the Pigeon River. (Record Folios 35-36). On April 28th, 1922, the ice in the Swamp River broke and the pulpwood commenced moving and on April 29th all of the pulpwood that had been cut was cleared out of the Swamp River into the Pigeon River. (Record Folios 35-36, 43, 52).

The Pigeon River forms the International boundary between the Dominion of Canada and Cook County, Minnesota, at the place in question. It took eighteen days to complete the drive of pulpwood down the Pigeon River. (Record Folio 53).

Upon arrival of the pulpwood at the mouth of Pigeon River, it was caught in booms to await the arrival of vessels to transport the wood to Muskegon, Michigan, (Record Folio 53-55, and the wood was transported to Muskegon, Michigan, as soon as practicable. Whatever delay there was, was due to natural causes. (Record Folio 53). It was necessary to wait for navigation to open in the spring of 1922.

The amount of tax levied and assessed was $2,654.09, (Record Folio 18), a small portion of the tax being levied upon personal property other than pulpwood. The Trial Court reduced the amount of tax to $2,233.44. (Record Folio 228). This was due to the fact that petitioners had but 8,367 cords of pulpwood, (Record Folio 228), rather than 10,000 cords of pulpwood as claimed by the Assessor. (Record Folio 17).

All the wood that was floated down Pigeon River was transported to Muskegon, Michigan, as soon as possible. (Record Folios 53, 55).

Petitioners had, previous to the time of cutting the wood, made arrangements to sell all of the wood to Central Paper Company of Muskegon, Michigan, (See contract, Record Folios 126-133), and the advances called for in the contract to be made by the Central Paper Company were made at the times required by the contract. (Record Folios 63, 64).

Petitioners claim that the taxes assessed are in violation of and repugnant to that part of Section 8 of Article I of the Constitution of the United States which provides that

> "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states,"

and Section 10 of Article I which provides that

> "No state shall, without the consent of Congress, lay any imposts or duties upon imports or exports except what may be absoltuely necessary for executing its inspection laws."

There are two rules, either of which is determinative of this case,—that an article of commerce is not subject to state taxation:

1. When the commodity has actually started on its interstate journey; or
2. Has actually been delivered to a carrier for the purpose of transporting from the state of origin to a foreign state.

This Court announced these rules in the leading case of *Coe vs. Errol*, 116 U. S. 517. The facts in that case were that logs had been cut during the winter and piled on the banks of the stream in the town of Errol, New Hampshire, to be afterwards floated down the Androscoggin River to the State of Maine, where they were to be manufactured and sold. The taxing authorities of the Town of Errol assessed the logs on the first of April, *before they had been moved*. It was held that the tax was valid. This Court said:

> "There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entreport for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transporta-

tion out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state. Of course they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation, or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution * * * But, if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and, until actually put in motion for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation, or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding."

Not that the rule laid down is, briefly:

"Such goods do not cease to be part of the gen-

eral mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been

(1) *Shipped or entered with a common carrier for transportation to another state;*

or

(2) *Have been started upon such transportation in a continuous route or journey."*

The italics are our own.

The pulpwood in the instant case was afloat and mov- g down the Pigeon River on May 1st, 1922. That fact ings the instant case under the second rule announced this Court.

The two rules or tests announced in the *Errol* case, to when a commodity becomes an article of interstate mmerce, have been uniformly adhered to in all sub- quent decisions of this Court.

The Supreme Court of Minnesota, in the case of *ate vs. Hammermill Paper Company*, 149 Minn. 414, pplied the first rule announced in the *Errol* case.

In the *Hammermill* case, the facts were that the ammermill Paper Company purchased wood during e winter of 1916-17. The wood at the time was some stance from Two Harbors and Knife River, Minnesota, d during the winter months, it was moved by a com- on carrier, the Duluth & Iron Range Rail Road Com- ny, over its line of railway, and was stored at Two arbors and Knife River in the railway company's yards, vaiting the arrival of vessels in the spring to transport e wood to Erie, Pa. The wood on May 1st, 1918, was ored at the two places indicated, and the wood all

moved to Erie subsequent to May 1st and during the season of navigation in the year 1918. The Minnesota Supreme Court said:

> "That the first movement was a part of an interstate journey, that the delay at ports did not destroy the interstate feature and that the property did not acquire a situs at the port for the purpose of taxation."

and further said:

> "It is contended on behalf of appellant that the lake ports were used merely as assembling points, and that the purchase and acceptance of the wood on board cars at these points were only for convenience in inspecting and measuring and that storage was a preliminary to the interstate journey. That the assembling of the wood shipped by rail was not different from that brought in on sleds. That the acts necessary to render the commodity shipped an article of interstate commerce remained yet to be performed, namely, the procuring of boats and the loading of the wood for shipment to its destination. And, further, that the indefinite delay at the ports destroyed the interstate feature of the shipment, if any such had attached prior to its arrival at such ports."
>
> * * * * *
>
> "As to the pulpwood involved in this action, the portion loaded on cars was so billed as to show its ultimate destination to be Erie, Pennsylvania. The trial court so found. The wood was stored with the rail carrier for shipment to Erie as soon as navigation over the lakes would permit. Under its contract $7 per cord was to be paid by the respondent

to the seller on or before the fifteenth of each month for all wood measured and accepted during the previous month, the balance of $1.60 per cord to be paid after the arrival of each cargo at Erie. All these matters were proper to be taken into consideration by the trial court in determining whether the wood was held in storage for the purpose of being forwarded to Erie as soon as the season would permit. That court passed upon this question and settled it adversely to appellant. State v. Franklin Sugar-Refining Co., 79 Minn. 127, 81 N. W. 752. It is common knowledge that the removal of pulpwood from the northern swamps and forests is practically confined to the winter season when the ground is frozen, which necessitates the hauling, unloading and holding at the docks until the opening of navigation in the spring. It is suggested that such shipments might be made by rail, thereby avoiding all delay, but the shipment of pulpwood such a distance by railroad would be wholly impracticable. The contract of purchase and sale clearly recognized this fact and contemplated shipment over the lakes. If the contract amounted to an actual sale and the wood was en route to fill the contract, it is of no importance whether the shipment by rail was made out in the name of the shipper or the buyer. The localities seeking to enforce the tax never had any proprietary interest in the wood. The wood was in the course of transportation to another state when the cars left the forest."

The only difference between the *Hammermill* case and the instant case is that in the *Hammermill* case the pulpwood was in the actual possession of a common carrier, while in the instant case, the pulpwood was actually moving down the Pigeon River on its interstate journey. The wood in each case was delayed a short time, due to

the fact that the season of navigation in each of the two years did not open as early as May 1st.

One of the first Minnesota cases involving a situation similar to that presented in this case is that of *State v. Franklin Sugar Refining Company*, 79 Minn. 127. In this particular case the Franklin Sugar Refining Company, through an agent in this state, took orders, but such orders were not accepted except at the Home Office of the Company, which company, to fill orders, shipped sugar into the state. The sugar was consigned to the order of the refining company and upon arrival in the state, or a few days after, was re-consigned, however, on the same bills of lading, which permitted a change in destination, to the purchaser. No sugar was shipped into the state by the refining company except to fill and satisfy orders previously received and accepted. It was held that the sugar was not subject to taxation by the taxing authorities of this state.

From the decisions, text writers have deduced the rule that a state tax on personal property in *transit* from one state to another is void and it is immaterial whether the tax is laid by the State of origin or the State of destination. In the one case, the protection of the commerce clause has attached, and in the other, such protection has not ceased.

It must be born in mind that the pulpwood on arrival at the mouth of the Pigeon River was not to be measured, sorted or brailed. (Record folio 64). There was nothing to be done to the pulpwood except to use a hoist or loader and take the wood from the water and place it on board vessels. It is true that booms were pro-

vided to prevent the wood from floating out into Lake Superior, prior to the arrival of vessels.

In addition to the *Hammermill* case hereinbefore referred to, the Minnesota Supreme Court has had before it for consideration the rules announced in the *Errol* case, in two other cases.

The first is that of *State vs. Tabor Lumber Company*, 101 Minn. 186. In this case the lumber company, holding considerable timber in the vicinity of lakes in Itasca County, had a contract with the Itasca Lumber Company for cutting lumber. During the winter of 1904-05 the lumber company cut timber, hauled and piled the same upon ice in lakes in Itasca County. The logs were placed in the lakes on or before April 1, 1905, and the booms were stretched about them and fastened to the shore to protect them from becoming scattered after the ice had melted. On May 1st, the logs, while they were still at the place where originally placed, were assessed. It was held that the logs were subject to taxation on the first of May for the reason that they had not *entered* upon their journey out of the state and had not become the subject of interstate commerce. However, a part of the logs had been moved and collected ready for delivery to a common carrier to be shipped, but they had not in fact been delivered to a common carrier, and it was held that this was nothing more than collecting the commodity preparatory to starting it on its interstate journey, and due to the fact that it had not been delivered to a common carrier, nor had it started on its interstate journey, therefore the tax was valid.

The second case is that of *State vs.Burlington Lumber Company*, 118 Minn. 329. This case applied the tests

from the *Errol* case, and it was held that the journey had not commenced but what was done was the mere collecting of the logs together for the purpose of afterwards starting them on the interstate journey. In that case the logs of the Burlington Lumber Company were intermingled with logs belonging to other parties, and on the arrival of the logs at St. Paul the St. Paul Boom Company sorted the logs, made them up into brails, and after May 1 in the particular year the brails were delivered to a vessel for towage to Burlington. It is seen that in the Burlington case the logs were not ready for shipment out of the State until after they were sorted and made into brails, and the interstate journey did not commence until some time after May 1, when the brails were delivered to a vessel for towage.

In the instant case, the pulpwood had actually started on its interstate journey on April 29th, and there was nothing whatever left to be done except to load the pulpwood on the vessel on the arrival of the pulpwood at the mouth of the Pigeon River. The situation is absolutely no different than if the vessel had been able to proceed up the Pigeon River to the Swamp River and load the pulpwood at that place on April 29th. Due to natural causes, it is not possible for vessels to navigate the Pigeon River.

In *State of Minnesota vs. Maxwell Motor Sales Corporation*, 142 Minn. 226, the following was said:

> "Property actually in transit from state to state is exempt from state taxation, but if it be stored for an indefinite time during such transit, *at least for other than natural causes, or lack of*

transportation, it may be lawfully assessed by the state authorities."

The pulpwood was in Pigeon Bay only incidentally in that Pigeon Bay was only a point of trans-shipment on the line of carriage.

In *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498, the facts show that the goods involved in that shipment were shipped on initial bills of lading from a point in Texas to a seaport town, it being the terminal in the same state. All of such goods were designed for shipment out of the state, and the question arose as to whether the consignee at the port of loading in the State of Texas, enjoying a special privilege from the railway company to the exclusion of others, was granted a preference in interstate commerce which the Interstate Commerce Commission could take cognizance of. It was held that this constituted an interstate shipment and that the commodity was moving in interstate commerce when it was designed that all the property should be transported to points outside the state.

The case of *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, involves the identical principles that we contend for here. In that case the facts showed that coal mined in Ohio is shipped to points on Lake Erie in the State of Ohio, such as Huron, Ohio, or Cleveland, Ohio, on bills of lading designating the coal as "lake-cargo coal". The coal would lay in the yards of the railroad company at the ports of trans-shipment awaiting the arrival of vessels, which might be immediately or some extended time afterwards. On the arrival

of the vessels the coal would be loaded on board the vessels and shipped to Duluth, Minnesota, or other upper lake ports. The railroad carriers did not issue through bills of lading, there being no joint tariffs between the rail carriers and the bulk cargo lake carriers. The specific question arose as to whether the rates and tariffs prescribed by the Ohio State Commission or by the Interstate Commerce Commission should be applied to such shipments for the carriage performed wholly within the State of Ohio. It was held that, as all of this coal was designed for ultimate shipment without the state, from the time it was loaded on cars at the mines in Ohio it constituted an article of interstate commerce and the rates and tariffs applied by the Interstate Commerce Commission should be applied.

In *Louisiana Railroad Commissioners v. Texas & Pacific Railway Company*, 229 U. S. 336, the court held that a shipment intended for export to a foreign country, but shipped to the exporting seaport on local bills of lading, the rail shipment being wholly within the state, was interstate commerce, and stated:

> "The shipments were in the physical custody of the railroad company until arrival at New Orleans, and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo."

In *Texas & New Orleans R. R. Co. v. Sabine Tram Company*, 227 U. S. 111, the facts show that lumber was ordered manufactured and shipped to a local port on a local bill of lading, through which port there was no local trade. After arriving at the local port it was unloaded into slips owned by the railway company and thereafter

shipped to the final destination outside of the state by a vessel not designated before the arrival of the lumber. The facts show that sometimes the lumber would await two or three months the arrival of a vessel, but all of the lumber at some time or other was ordered out and shipped to Europe. The court held that continuous line of shipments through the same ports to foreign ports of merchandise, in which there is no local trade, shows a continuity of transportation which is not broken by a mere delay in trans-shipment.

In *State v. Engle*, 34 New Jersey Law, 425, it was held that coal in transit is not assessable for taxes where it had been mined in Pennsylvania, sent by cars to Elizabeth Port, New Jersey, to be then shipped by water to other markets for the purpose of sale. When the coal reached Elizabeth Port it was separated according to size and when a cargo of one size was obtained it was shipped to points in New England or on the Hudson River as soon as a vessel could be chartered to carry it. None of the coal was sold for consumption at Elizabeth Port.

In *Ogilvie v. Crawford County*, 7 Fed. 745, a demurrer to a petition for the recovery of taxes paid was overruled. The petition shows that corn had been purchased in Iowa, moved from the places where it was purchased and placed on a railway right-of-way in temporary cribs awaiting shipment, and that it was the intention at all times to move the corn in bulk beyond the state and not to sell or manufacture any part of it within the state of Iowa, and the corn had actually in fact been moved beyond the state boundaries.

In *Prairie Oil & Gas Company v. Ehrhardt*, 244 Ill.

634, 91 N. E. 680, it was held that oil pumped through a pipe line on its way from one state to a point in another is a subject of interstate commerce and is exempt from local taxation.

The case of *Kelly v. Rhodes*, 188 U. S. 1, 47 L. Ed. 359, was cited to the Court, but the Court apparently failed to give the effect to this decision in this case. The facts show that a flock of 10,000 sheep was being driven from the territory of Utah by a distinct route across the State of Wyoming to the State of Nebraska, the sheep driven at an average rate of approximately nine miles per day. On the way across Wyoming the sheep fed on grass and there was some evidence to the effect that the sheep took on weight while passing through the state. It was held, however, that as long as the intention of the parties was that the sheep should go from Utah across the State of Wyoming to Nebraska that the sheep were a subject of interstate commerce and exempt from taxation under the Wyoming laws.

In *Ala. Ga. Southern R. Co. v. McFadden*, 232 Fed. 1,000, it was held that where cotton was shipped to a point within the state where the shipments originated and then compressed, from thence carried to points without the state, the shipments to the point where the cotton was compressed were not intrastate commerce shipments, there being no change of ownership, but were part of an interstate shipment, and interstate rates should be charged; the mere fact that the cotton was not always billed to its ultimate destination until after compression not affecting the matter.

In *Stockton Elevator & Shipping Assn. v. Missouri Pacific Railway*, 97 Kan. 235, 154 Pac. 1126, it was held

that a shipment of goods consigned to a point in another state constitutes interstate commerce, notwithstanding an actual delivery is made before a state line is crossed.

Consideration of the Decree of the Minnesota Supreme Court in the Instant Case.

We contend that the Minnesota Supreme Court failed to appreciate the facts involved in the case of *Coe vs. Errol.*

The Minnesota Court stated in reference to the *Errol* case:

> "So it was held in the controlling case, that saw logs partially prepared for export from New Hampshire, and which had been floated to and deposited at the place or port of shipment, within the state, were liable to be taxed therein."

We do not understand that in the Errol case any question was raised in the Supreme Court of the United States as to any logs that had been floated. Reference to the case of *Coe vs. Errol* in 62 N. H. 303, shows that the tax was levied on two classes of products: (1) Logs that had been hauled by sleigh to the banks of the Androscoggin River and were on the banks of the river at the time the tax was levied and assessed. It was held that such tax was properly levied and assessed. (2) The other class was that of logs which had been floated down the Androscoggin River in transportation to the State

of Maine, but due to the low stage of water in the river, the logs had been left in the town of Errol in the river for the summers of 1879 and 1880. It was held that such logs were not taxable. The Supreme Court of New Hampshire said the following:

> "The petitioner also asks for an abatement of the taxes, assessed by the defendants in 1880 and 1881, upon a lot of logs owned by himself and one Pingree, another non-resident, which had been cut in Maine and driven through the Rangeley lakes and rivers into the Androscoggin river in this state, and, while on their way to mills owned by Pingree and himself in Lewiston, Me., had, on account of low water, been left in Errol in the summers of 1879 and 1880. The petition also sets forth that the Androscoggin river then was, and had been for more than twenty years, a public highway for the floating of timber and logs from the lakes and rivers in Maine down that river to Lewiston, and had been so used by the petitioner and his associates for more than twenty years last past.
>
> "The facts thus stated clearly show that these logs were brought into this state in the usual course of transportation, and remained here no longer than was necessary under the circumstances. In short, they were merely passing through the state, and therefore were not taxable in this jurisdiction. *Conn Riv. Lumber Co. v. Columbia, ante,* 286."

This Court, in connection with logs that had already been placed in the river, said the following, in the *Errol* case:

> "This question does not present the predicament of goods in course of transportation through

a State, although detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation."

The New Hampshire Supreme Court refers to its prior decision in the case of *Connecticut River Lumber Company vs. Columbia*, 62 N. H. 286. It was held that logs drawn from Vermont into New Hampshire and delivered on ice in the Connecticut River and were stored on the ice temporarily, awaiting transportation as soon as the ice should break in the spring, the purpose of the purchaser of the logs being to float the logs down the river to his mills in another state, and the purpose being followed by actual transportation within a reasonable time, were in commercial transit and were exempt from state taxation.

It seems to us that in the instant case, where the pulpwood was actually in transit in the Pigeon River on May 1st, and was, as soon as practicable, that is as soon as a boat could arrive in the Pigeon Bay, transported to Muskegon, Michigan, was an article of interstate commerce and not subject to local state taxation.

We respectfully submit that the decision of the Supreme Court of Minnesota is erroneous and that the

Writ of Certiorari prayed for to the Supreme Court of the State of Minnesota should be allowed.

Respectfully submitted,

OSCAR MITCHELL
and
W. D. BAILEY,
Solicitors for Petitioners.

Office Supreme Court, U. S.
FILED
SEP 22 1925

SUPREME COURT of the UNITED STATES

October Term, 1925

No. [redacted] 170

HUGHES BROS. TIMBER COMPANY, A CO-PARTNERSHIP, *Petitioners,*

vs.

STATE OF MINNESOTA, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOW-ARNESON CO., ST. PAUL

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IN THE SUPREME COURT OF THE UNITED STATES

HUGHES BROS. TIMBER COMPANY, a Co-Partnership,

Petitioners,

vs. No.

STATE OF MINNESOTA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

The question sought by the petitioners to be reviewed is as to the validity of a tax levied by Cook County, Minnesota, against the petitioners in 1922 upon a quantity of pulpwood cut from the forests of Cook County in the winter of 1921 and 1922, and afloat in Pigeon River on the first of May of the year the tax was levied.

A glance at the map of Minnesota will show that Cook County is the most northeasterly point of the state north of Lake Superior, that lake forming the southerly boundary of the county, and the Pigeon River forming the northerly boundary and separating the county and the state from the Dominion of Canada.

In Minnesota, taxes are levied as of the status of the property assessed on the first day of May in each year. Real estate taxes are assessed against and follow the land. Personal property taxes are assessed against the individual owner and become a personal obligation on his part.

In the final levy of personal property taxes in a taxing district, the different kinds of property are not separated, but a total levy against the individual for the property of the taxpayer in that district is made. It is only in the assessment

sheets and papers preliminary to the final assessment that the different kinds of property assessed are shown.

So in the case at bar the entire tax levied against the petitioners for the year 1922 and for which judgment was finally entered against them was $2,233.44. But not all of this was assessed against pulpwood. The petitioners had in Cook County on May 1st, 1922, household furniture, horses and mules, wagons, sleighs, harnesses, saddles, blacksmith tools and pulpwood, the assessment upon all of which went to make up the total of the tax levied. (See Record pages 34 and 35.) The greater part of the tax was, however, on account of the value of pulpwood. (See Findings of Trial Court, Record page 66, Folio 196.)

This pulpwood had been cut from standing timber in Cook County, hauled by teams and sleighs to and piled on the bank of Swamp River, a tributary of Pigeon River. When the ice broke up it was dumped into Swamp River and floated down that stream into Pigeon River and down the latter river to its mouth at Lake Superior.

The petitioners had contracted the previous fall to sell this timber to the Central Paper Company of Muskegon, Michigan, and to deliver it to that company on board vessels at Pigeon Bay at the mouth of Pigeon River in Lake Superior, from which point it was to be transported by vessel to Muskegon, Michigan. The boats to be used in transporting the timber from Pigeon Bay to Muskegon were to be furnished by the purchaser, the Central Paper Company. (See defendant's Exhibit 1, Record pages 36 and 37, and particularly the portions at Folios 108, 109, and 110). The place of delivery of the pulpwood, then, by the seller (the petitioners here) to the purchaser was on board vessels, furnished by the purchaser, at the mouth of Pigeon River. On the first of May 1922, this commodity was afloat in Pigeon River in charge of the petitioners, the sellers under the contract, on its way to be delivered to the purchasers at the mouth of that river.

ARGUMENT.

It seems to the writer that no stronger argument to refute the contention of petitioners can be made than to refer to the authorities cited and some of the statements contained in the petition and brief of counsel in their application for a writ. In other words, if properly analyzed in connection with the undisputed facts, their argument answers itself.

On pages 9 and 10 of their petition and brief, counsel quote at considerable length from the opinion in Coe vs. Errol, 116 U. S. 517. In that case this court laid down rules from which to determine when a commodity originating in a state and designed for transportation out of the state might be taxed in the state of its origin and when it could not.

Among the portions of the opinion quoted counsel refer particularly to this:

> "Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been
>
> (1) Shipped or entered with a common carrier for transportation to another state;
>
> or
>
> (2) Have been started upon such transportation in a continuous route or journey."

Counsel concede that the rule laid down in their subdivision (1) of this quotation does not apply in this case. The timber had not been shipped or entered with a common carrier for transportation out of the state. They do contend, however, that the second rule quoted applies; that is, that this commodity had on May 1st, 1922, been started upon transportation in a continuous route or journey to another state.

Counsel also quote at considerable length from the case of State vs. Hammermill Paper Company, 149 Minn. 414, where a quantity of pulpwood stored on the bank of Lake Superior

at the mouth of Knife River in Lake County, Minnesota, on May 1st, 1918, and designed for shipment by boats down the Great Lakes to the Paper Company's mills at Erie, Pennsylvania, was held not taxable. In that case the timber had been billed over a railroad and shipped from the woods to the end of the railroad at the mouth of Knife River and there unloaded on the bank of the lake so as to be transferred to vessels in which it was to continue its journey to its destination in Pennsylvania. When delivered to the railroad in the woods it was billed to its destination at Erie, Pennsylvania. The Minnesota Supreme Court applied to that case the rules laid down in Coe vs. Errol and held that the timber was not taxable because it had been entered with a common carrier for transportation to another state. It was held that the fact that on May 1st it was stored on the bank of the lake waiting for vessels to continue it on its journey made no difference. That a break in transportation caused by the necessity of transferring the commodity from one carrier to another did not destroy the interstate character which the commodity had assumed when delivered to and billed over the railroad for delivery outside of the state.

But in that case a part of the pulpwood stored at Knife River May 1st did not reach that point over the railroad but was hauled there by teams from the woods in the vicinity. As to the part so hauled by teams the court held that it had not commenced its interstate journey and was subject to taxation by the State.

In the instant case Judge Stone of the Minnesota Supreme Court, (referring to the Hammermill case), says in the opinion, (Record bottom of page 73, and top of page 74):

> "Involved in that case also was a quantity of wood hauled in on sleds and stored with the other, but, unlike the latter, its final journey out of the state had not begun and it was held taxable."

Another distinction between the case at bar and the Ham-

mermill case which was not raised in the Supreme Court of Minnesota, occurs to the writer.

In the Hammermill case the commodity had apparently been delivered to the non-resident purchaser. The Curry and White Company of Duluth had cut and delivered that timber under contract with the Hammermill Paper Company. The timber was billed over the railroad and to its destination in the name of the purchaser, the Hammermill Paper Company. The tax was levied against the Hammermill Paper Company and the controversy as to the validity of the tax was between the State and the Hammermill Paper Company, a non-resident purchaser and shipper of property from Minnesota.

The case at bar aside from the question of delivery to a carrier, would be like the Hammermill case, as regards the question of the commodity having begun its interstate journey, if the petitioners had delivered the timber to the Central Paper Company after it was cut in Cook County, and if the Central Paper Company had been the party in charge of the timber and who was floating it down the Pigeon River on the first of May 1922, and if the County of Cook instead of assessing the tax thereon against the petitioners, residents of Minnesota, had levied the tax against the Central Paper Company, a non-resident purchaser and shipper of the property from the state.

If such had been the situation a very different question would be here presented for determination. It might,under the suggested circumstances perhaps be consistently urged that the commodity had commenced its interstate journey on May 1st, because if it had been in charge of the purchaser who was at the time of the taxing period floating it down the Pigeon River with the intention of shipping it from the mouth of that river to its mills in Pennsylvania, there would not be opportunity for the contingency to arise whereby it might never be shipped to or reach its destination as suggested in the opinion of Coe vs. Errol where the court says:

> "Though intended for exportation they may never be exported; the owner has a perfect right to change its

> mind; and until actually put in motion for some place out of the state or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state?"

In the instant case the timber was on the first of May, 1922, in the possession of the petitioners, the parties who had contracted to sell it and deliver it at the mouth of the river. Some contingency might have arisen, such as the inability of the purchaser to procure vessels or to carry out its contract of purchase whereby the timber never would have been delivered under the contract, and consequently never would have partaken of the character of a commodity in course of interstate transportation. If it had been in process of journeying down the river in the possession of the purchasers, the presumption would be that the purchaser would carry out his intention to transport it out of the state, but until delivered to the purchaser or put in possession of a carrier designated to deliver it to the purchaser, how can it be claimed that its interstate journey had commenced?

Then, too, if it be held that it had commenced its interstate journey simply because it was floating down the river on May 1st, and the party in charge intended to deliver it to a purchaser at the mouth of the river to be shipped out of the state, the same argument would apply during the period that the timber was being hauled from the woods with sleighs, to the bank of Swamp River. The Pigeon River was but a highway used by the seller of the timber, over which to transport it to the agreed place of delivery. It would have been the same if it had been transported from the woods where cut to the mouth of Pigeon River by teams over wagon roads. Certainly the intention of the seller to deliver it at the lake shore and have it go from there to Pennsylvania can in no way be controlling on the question of its having commenced its interstate journey. The intention to have the timber take this course evidently existed when the tree was cut and sawed up.

The citation, by counsel for petitioners, of Interstate Commerce cases and their argument based thereon, are best answered by a quotation from the opinion of Judge Stone of the Minnesota Supreme Court in the case at bar. He there says, (Record page 74):

> "It is not easy to determine in every case just where a movement of goods intended for interstate or foreign commerce takes on that character. That inherent difficulty is especially apparent from a comparison of Coe vs. Errol, supra, involving the right of a state to tax such property, or rather to tax the owner on account of it, with the cases involving an attempt of the exporting state to burden the movement of such goods by discriminatory rates for transportation or by direct regulation of an interstate carrier. The latter type of cases is illustrated by Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U. S. 498, 55 L. Ed. 310; Ohio Railroad Commission vs. Worthington, 225 U. S. 101, 56 L. Ed. 1004; Texas & New Orleans R. R. Co. vs. Sabine Tram Co. 227 U. S. 111, 57 L. Ed. 442, and Louisiana Railroad Commission vs. Texas and Pacific Railway Co. 229 U. S. 336, 57 L. Ed. 1215. In those cases what was considered the initial movement of interstate or foreign commerce was very similar to that which in Coe vs. Errol was held to be interior, preliminary to and no part of the interstate movement. A possible distinction is that in the last cases cited the exercise of state authority was considered a direct interference with and burden upon the movement of goods in interstate commerce, whereas in the tax cases there was no attempt whatsoever to interfere with or burden the movement of goods but only an effort to tax property owners because of their ownership of goods.
>
> It is not, primarily, a purpose of the commerce clause to prevent state taxation of any property. 'A state tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce.' Underwood Typewriter Co. vs. Chamberlain, 254 U. S. 113, 65 L. Ed. 165. The tax in such a case is invalid only when it becomes a burden upon federal commerce or an intrusion upon the domain of national regulation. A

transportation rate or a regulation of an interstate carrier frequently has a direct and immediate burdening or regulating effect upon commerce itself, the movement of persons or goods, not possessed by a tax against the owners of the subjects or instruments of commerce."

It would seem that the question sought to be reviewed has heretofore been clearly determined by this court, and that the decision of the Supreme Court of Minnesota is in accordance with that determination, and that consequently the petition for a Writ of Certiorari shoud be denied.

Respectfully submitted,

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WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 170.

HUGHES BROS. TIMBER COMPANY,
Petitioners,

v.

THE STATE OF MINNESOTA,
Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT

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BRIEF AND ARGUMENT FOR RESPONDENT

STATEMENT OF THE CASE.

The petitioners are citizens of the state of Minnesota, engaged as partners in the cutting and marketing of forest products, and having their principal place of business at the city of Duluth in that state. In October, 1921, they entered into a contract with the Central Paper Company of Muskegon, Michigan, by which they undertook to cut and deliver to the paper company, "over the

rail of vessel and stowed at Pigeon Bay at the mouth of Pigeon river, approximately 10,000 cords of spruce pulpwood," for which the paper company agreed to pay $12 per cord f. o. b. vessel.

The paper company agreed to supply the necessary vessels to transport this pulpwood from the point of delivery at Pigeon Bay to Muskegon, giving the timber company at least three days' notice of arrival on each vessel; and the timber company agreed to load and stow away the pulpwood on the boats so furnished as expeditiously as possible after arrival, at the rate of not less than 250 cords per day per vessel, and by the agreement was to be held for demurrage resulting from delays in loading. The contract appears in the transcript of the record at pages 36 and 38. Hereinafter when referring to the transcript we shall indicate the page merely by number in parenthesis.

For the purposes of the contract, the petitioners, during the winter of 1921-2, cut from the Minnesota forests in Cook county, hauled and banked upon the ice in Swamp river, a tributary of Pigeon river, several thousand cords of pulpwood. The cutting and hauling was completed the latter part of March, 1922 (11-12). When the ice thawed the timber was floated down the Swamp river to its confluence with the Pigeon river, which forms a part of the boundary between the state of Minnesota and the dominion of Canada, and thence down that stream to the point of delivery at Pigeon Bay, the mouth of Pigeon river, on Lake Superior.

Most of this pulpwood was afloat in the river on April 29 and all arrived at Pigeon Bay within 18 days thereafter (12-13). It was there held in boom for the opening of navigation on Lake Superior and the arrival of the boats to load (15-). During the summer of 1922 it was loaded by the petitioners from the Pigeon river booms onto boats furnished by the paper company and transported in these boats to Muskegon, Michigan (15-16). In accordance with the requirements of the contract, payments were made during the months of January, February and March at river landings—$3 per cord provisional measure, an additional $3 per cord when the timber arrived at the mouth of the Pigeon river, and the remaining $6 per cord upon arrival and measurement at Muskegon (18, 37-8).

In the month of May, 1922, the petitioners, in accordance with the requirements of the Minnesota statute, filed with the assessor of Cook county a scheduled statement of all personal property owned by them on the first day of May, 1922, and included therein the pulpwood in question, stating the quantity thereof, however, at 1500 cords (33-36). The board of county commissioners, acting as a board of assessment and equalization, increased the scheduled number of cords to 10,900 (64), and the petitioners were taxed for this amount. The tax was not paid, and accordingly it was certified as delinquent and the usual citation was issued (2). The petitioners answered, setting up in substance that on May 1, 1922, this pulpwood was in actual transit in continuous route or jour-

ney from the state of Minnesota to the state of Michigan, that it had no situs for taxation purposes in Minnesota, and that the imposition of the tax would amount to a burden upon interstate commerce, contrary to the constitution and laws of the United States (3-6).

The case was tried before the court without a jury. The court made its findings of fact substantially as the facts are here stated, and directed judgment against the defendant sustaining the tax as upon 8367 cords of pulpwood (62-6). Upon these findings judgment was entered against the petitioners in the amount of $2795.97 (66-7). They appealed to the supreme court of Minnesota (68), where the judgment was affirmed (69-78). The case is officially reported in volume 163, Minnesota Reports, at page 4, and is before this court for review on certiorari (80).

ARGUMENT.

The judgment of the Supreme Court of Minnesota is in accord with the previous decisions of that court. As to the character of the tax and the nature of the proceeding, the court has said:

> "Under our laws, taxes, as respects the personal property of a resident owner, are not imposed on the property, but against the owner. While it is common, even in such cases, to speak of the property as though taxes were imposed upon or against it, that is a mere convenience in speech, and does not indicate the real nature of the proceeding, which is *in personam*, not *in rem*. The resident owner of personal property is charged with taxes on account of, and measured by, the property which he owns. The tax is enforced by distraining all his goods, without regard to the particular property assessed, or by personal judgment and execution."
>
> Clarke v. County of Stearns, 47 Minn. 552.

Again, the court has said:

> "Personal taxes are assessed against the person and not against the property, and are not even a lien upon it. It is true, the person is taxed on account of the property. And the value of the property determines how much the owner shall be taxed, but the tax is against him personally. If the tax is assessed against A, it cannot be collected from B, although the latter was the party against whom it ought to have been assessed."
>
> State v. Red River Valley Elevator Co., 69 Minn. 131.

In Minnesota personal property is assessed as of its status on the first day of May of each year.

Brief for Petitioners, p. 2.

> "All real property subject to taxation shall be listed and assessed every even-numbered year with reference to its value on May 1, preceding the assessment, and all real property becoming taxable any intervening year shall be listed and assessed with reference to its value on May 1 of that year. Personal property shall be listed and assessed annually with reference to its value on May 1, and, if acquired on that day, shall be listed by or for the person acquiring it."
>
> General Statutes 1913, § 1979 (General Statutes 1923, § 1984).

The assessment in this case was made in the ordinary and usual way of assessing property in the state. The property was not assessed because of its being intended for exportation, but was assessed the same as all the mass of personal property within the state subject to assessment in the year 1922. We speak of assessment, that is, of the mere listing of the property as a basis upon which the owner is to be taxed.

The state of Minnesota has not levied any tax against the logs or pulpwood of the Hughes Brothers Timber Company. It has levied a tax against the company itself based upon the value of its logs and pulpwood. It has used the logs and pulpwood as a measure to determine the amount of the tax payable by the petitioners upon personal property owned by them and in their possession within the state on the first day of May, 1922.

The right of the state to tax this class of property, although intended for export, is clearly declared in the previous decisions of its courts. The claim is made, and the petitioners' contention rests on this, that when this pulpwood was banked upon the ice in the Swamp river with the ultimate purpose of floating it to the point of delivery for transportation to a point outside the state, it became merchandise moving in interstate commerce and hence not subject to state taxation.

This court in Coe v. Errol, 116 U. S. 517, said:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any designation, in the usual way and manner in which such property is taxed in the state. * * * But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of

assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed?

* * What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. * * * But this movement does not begin until the articles have been shipped or started for transportation from one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. * * * Carrying it from the farm or the forest, to a depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state, its exportation is a

matter altogether *in fieri*, not a fixed and certain thing."

It is claimed that upon its facts the instant case is not within the rule of the Errol case and, moreover, is not decided in accordance with the usual rule of decision in Minnesota.

Of course, property produced for use in interstate commerce may be taxed in the state where produced only in accordance with the rule applied to the general mass of personal property taxable within the state. To tax it otherwise in any case would result in placing a burden upon interstate commerce. We ask the indulgence of the court and the privilege of a somewhat extended statement of the Minnesota decisions, all of which, as we think, recognize and apply the principles of the Errol case.

In State v. Taber Lumber Company, 101 Minn. 186, the lumber company, an Iowa corporation engaged in the manufacture and sale of lumber products at Keokuk, Iowa, owned a considerable quantity of standing timber in Itasca county, Minnesota, and had a continuing contract with the Itasca Lumber Company, a Minnesota corporation, to cut, log, and transport the timber of the Taber company over a railroad to the Mississippi river and thence down the river as far as Pokegama dam near the city of Grand Rapids in that county. During the winter of 1904-5 the Itasca company cut something over 10,000,000 feet of the standing

timber, converted it into saw logs, which it hauled and piled upon the ice in certain lakes, and, as the ice in the lake should melt, floated them across the lakes to the landing place, where, by means of hoists maintained by a railroad company, they were lifted from the water and loaded onto the cars for the purpose of transportation to the Mississippi river. The logs were in the lakes referred to on May 1, 1905, but subsequently were taken from the respective places where they had been landed and boomed and moved to the hoists referred, there loaded and transported to the Mississippi river, and thereafter in due course of time delivered to the Taber company's mills at Keokuk. The Taber company was taxed as for the assessed value of the timber; and in resisting proceedings for the enforcement of the tax it took the position that immediately the logs were banked upon the ice of the several lakes and the booms thrown around them to hold them in place until water conditions would permit of their being floated to the respective hoists for delivery upon the cars of the railroad company for transportation to the Mississippi river and thence down that stream to Keokuk, their delivery, for the purpose of exportation, was complete; in other words, the banking and booming of the logs in the manner stated was equivalent to depositing them in the depot or entrepot of the common carrier. In passing upon this contention, the court, after quoting from the opinion of this court in the Errol case, said:

"If the logs in question were finally delivered by appellant company to the common carrier when banked and boomed on the ice, then they became the subject of interstate commerce on or before April 1; but if the process of towing the logs through the lakes to the hoists was simply a part of the work of delivery to the common carrier, then the case is similar to Coe v. Errol, supra, and on the first day of May the logs had not ceased to be a part of the general mass of property of the state. The fact that there was a continuing agreement between the appellant and the Itasca Lumber Company for the annual cutting of pine timber upon appellant's lands, making the same into logs and transporting them through the lakes over the railroad to the Mississippi river, and down the river to Pokegama dam, does not, in itself, stamp the work of moving the logs, after being banked and boomed on the ice, as interstate commerce.

* * * * *

"The proviso in § 822, R. L. 1905, reads:

"'* * * Provided, that logs and timber cut from lands within, and designed to be transported out of, this state shall be assessed and taxed in the taxing district where found on May 1.'

"The plain intent of the legislature, as expressed by this language, was that logs should not be exempt from taxation merely because they were cut with a design of exporting them out of the state. So the purpose and intent with which the logs were placed on the ice is not important, and the question narrows down to whether or not, on May 1, the logs had been delivered for exportation. *In our*

judgment, it conclusively appears from the evidence that on that date all of the property was still under the dominion and control of appellant through its agents, the Itasca Lumber Company, and that a material part of the work of delivery for exportation was still to be done."

The tax was sustained and judgment for the amount thereof was affirmed.

In State v. Burlington Lumber Company, 118 Minn. 329, a somewhat similar situation obtained. The lumber company, an Iowa corporation, with no place of business in Minnesota, during the logging season of 1903-4, cut and banked on the Mississippi river, and its tributaries above Brainerd a large quantity of logs, which were cut and banked with the intention on the part of the company of driving them down the river to its saw mill at Burlington, Iowa. During 1904 the logs were placed in the river and its tributaries and driven to or towards Minneapolis, where they arrived intermingled with logs of other owners. There they were stopped and held in the booms of a river boom company, and when sorted by that company were again turned into the river and driven to St. Paul, where they were held within the booms of another river boom company some time prior to May 1, 1905. The St. Paul boom company took possession of them for the defendant and made them into brails, the logs being scaled by the surveyor general as they were

brailed. The boom company, still acting for the Iowa company, tied the logs so brailed to a raft at Lilly Dale below their works, where they remained, still in possession of the boom company acting for the defendant, from some time prior to May 1, 1905, until a short time after that date. The brails were then delivered to a steamship company acting as a common carrier for transportation down the Mississippi to Burlington. Some of the brails were delivered to the steamship company for towage on May 2, 1905, and some on May 6, 1905, and were finally delivered to the lumber company at Burlington during the months of May, June, and August of that year; but before delivery to the carrier and while in possession of the St. Paul boom company at Lilly Dale the logs contained in these brails were assessed for taxation as of May 1, 1905. In proceedings for the enforcement of the tax judgment was entered in favor of the state, and an appeal was taken to the supreme court.

The court, quoting the rule, declared in Coe v. Errol, that logs cut for shipments out of the state do not cease to be part of the general mass of property in the state subject to its jurisdiction and taxation in the usual way until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey, said:

> "Taking the rule, as thus pronounced, literally and without clarification, any move-

ment, whether by hand, sleds, road vehicles, water craft, floating, or railroad, might be deemed the beginning of the journey. In the case of logs and timber the mere dragging of a single log over the snow, from the place where the tree is felled to the bank of the stream in which it is to be floated in the following spring, might be deemed the beginning of a movement to another state. But the rule, as pronounced in the Errol case, contemplates something more than movements incident to the gathering together of the component parts of the final package or conglomerate mass which is finally to be shipped or transported. * * * But where the transaction involves a gathering together of separate articles and their aggregation into a package or mass for the final journey, it would seem, at least as a general rule, that the movement incident to such assembling of the component parts of such final package or mass should be held to be a matter of mere preparation for shipment. * *

"We have considered in this connection that the Mississippi river is navigable for floatage from the point where the logs entered it above Brainerd to the point where they were brailed, and that there was no change of ownership during the journey down the river to the boom of the St. Paul company, nor at such boom, the function of the boom company being merely to brail the logs and hold them for the defendant and to deliver them to the steamer; that the steamer was in the defendant's sole employ; and that the logs, first and last, belonged to the defendant, and were intended for its mills at Burlington. Such considera-

> tions are not, however, conclusive of the question as to when the interstate journey began (State v. Taber Lumber Co., supra), and to our mind they are heavily outweighed by the other circumstances in the case."

The tax was sustained, and the judgment against the defendant for the amount thereof was affirmed.

We do not agree with the suggestion that in State v. Hammermill Paper Co., 149 Minn. 414, there was a departure from the previous decisions of the court to which we have directed attention. The court in its decision in the instant case said:

> "The logs involved in State v. Burlington Lumber Co. occupied relatively about the same position this pulpwood would have been in at the booms in Pigeon Bay. They were well on their way—in fact brailed in the Mississippi below St. Paul and actually awaiting the boats to take them on their final journey out of the state. They were held taxable. The Hammermill Paper Company case is to the same effect, although for the most part an opposite result was reached. The bulk of the wood there involved was already in the hands of an interstate carrier and actually billed out of the state under interstate rates. It was a very different situation from that now under consideration and was held not taxable. Involved in that case was a quantity of wood 'hauled in on sleds' and stored with the other, but, unlike the latter, its final journey out of the state had not begun and it was held taxable."

We think further comment on the Hammermill case unnecessary.

Whether merchandise produced in one state for the purpose of sale and transportation to a point without the state is at a given time in interstate commerce may be a question of fact, the determination of which by the trial court becomes conclusive.

Ohio Railroad Commission v. Worthington, 225 U. S. 101;

Southern Pacific v. Arizona, 249 U. S. 477.

"There must be a point of time when they [goods destined to other states] cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination."

Coe v. Errol, 116 U. S. 517.

"There may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state. In the one case, though it have not reached its place of disembarkation or delivery, it may be taxed. Brown v. Houston, 114 U. S. 662. In the other case, until it be shipped or started on its final journey, it may be taxed. Coe v. Errol, 116 U. S. 517."

Diamond Match Co. v. Ontonagon, 188 U. S. 96.

The instant case is not altogether unlike Burlington Lumber Co. v. Willetts, 118 Ill. 559, cited by this court with apparent approval in General Oil Co. v. Crain, 269 U. S. 230. It was there held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi river and stopped at a place in Illinois, to be there kept until needed at Burlington for mill purposes, were subject to taxation in the state of Illinois. Here the logs were held in the Pigeon river or its tributary until such time as boats for their transportation might be sent by the paper company to the mouth of the Pigeon river, which was designated in the contract between the petitioners and the paper company as the point of delivery. When delivered f. o. b. paper company's boat at the indicated point, and not before, they were started on their ultimate passage to a point without the state. Then, and not before, they became property moved in interstate commerce.

The mere fact that merchandise manufactured or otherwise produced in one state is intended for interstate transportation does not render such merchandise subject to federal control under the commerce power. When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state, nor by his preparation or assimilation of it for the purpose of such transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.

Hammer v. Dagenhart, 247 U. S. 272;

The essential character of the transportation of this pulpwood, first in carts or sleds from the place where the tree was felled and cut into logs to the river bank and later on the floating of it in the stream to Pigeon Bay, and not the purpose of such transportation, determines whether state or national law applies to the transaction.

> "The owner's state of mind in relation to the logs, his intent to export them, and even his partial preparation to do so, did not exempt them from state taxation, because they did not pass within the domain of the Federal law until they had been shipped, or entered with a common carrier for transportation to another state, or had been started upon such transportation in a continuous route or journey."
>
> New York Central R. R. Co. v. Mohney, 252 U. S. 155.

We submit that the case for the petitioners is not improved by the citation of decisions in which it appears that the commodity sought to be taxed had originated in a state other than the taxing commonwealth and was at the time of the taxing period in the latter state temporarily on its way to a third state, as in Kelley v. Rhoads, 188 U. S. 1. There the flock of sheep, the subject of the tax, originated in Utah and were temporarily in Wyoming on their way to Nebraska. Wyoming attempted to levy a tax against these sheep temporarily within its borders. Of course it was held that the imposition of such a tax operated as a burden upon interstate commerce. As said in the opinion of the court below in the instant case:

> "The bare statement of the case shows how different it is from this one."

Here the timber originated in Minnesota and was in the possession of the petitioners within that state on the first day of May, the date on which assessments are there made for taxation purposes. It had been contracted to be sold and was to be delivered to the paper company on board its vessels at the mouth of the Pigeon river for transportation from that point beyond the borders of the state, in accordance with the contract of sale and delivery between the petitioners and the paper company (Record, p. 36, f. 108). The court will note the contract provision:

> "For the consideration hereinafter specified, the timber company agrees to deliver to the paper company, over the rail of vessels and stowed at Pigeon Bay at the mouth of Pigeon river, approximately 10,000 cords of spruce pulpwood."

Again, at p. 109, f. 37, the contract reads:

> "The timber company agrees to load the wood in boats furnished by the paper company for such purpose and stow the same away on said vessels as promptly and expeditiously as possible after they arrive."

Based upon this contract and the other evidence, the trial court found as a fact the following (Amended Findings, Record, p. 65, par. 8, f. 194):

> "That the floating of said timber down the Swamp and Pigeon rivers and into Pigeon Bay was no part of an interstate journey, but

> was done for the purpose of collecting the said timber at the point in Pigeon Bay where delivery was to be made to the paper company upon boats."

The timber, at the time of the assessment, was still in the hands of the timber company, the seller. It did not pass to the possession of the paper company, the purchaser, until delivered on board its vessels at the mouth of Pigeon river some time later in the summer. How, then, can it be claimed to have been in the course of interstate transportation on the first day of May? The finding of the trial court to the contrary is fully sustained.

The situation disclosed by the record is quite essentially different from that involved in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; and Louisiana R. R. Commission v. Texas & Pacific Ry. Co., 229 U. S. 336, in each of which transportation rates were involved, and the question was whether the shipment was intrastate or interstate in character.

> "The question, it should be observed, is not with respect to the extent of the power of congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority."

Bacon v. Illinois, 227 U. S. 516;

American Steel & Wire Co. v. Speed, 192 U. S. 500.

The Minnesota statute provides that personal property pertaining to the business of a merchant or of a manufacturer shall be listed in the town or district where his business is carried on, but contains the proviso that logs and timber cut from lands within and designed to be transported out of the state shall be taxed and assessed in the taxing district where found on the first day of May.

Revised Laws 1905, § 822 (General Statutes 1923, § 2005).

The purpose of the proviso is to fix the situs of this class of property when within the state and otherwise taxable as in the taxing district in which it shall be found on the first day of May.

> "No purpose to burden interstate commerce is evident in the statute, and the power of the state to tax everything which is a part of what has been called 'the general property' or 'the general mass of property' of the state is undoubted."
>
> Diamond Match Co. v. Ontonagon, 188 U. S. 92.

It is not, we submit, the purpose of the commerce clause to deny to the state the right to impose a tax upon its own citizens based upon the value of property produced by them and in their possession at the date of the taxing period, although in process of delivery at a point within the state for the

purpose of transportation therefrom by the consignee to a point in another state.

> "A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce."
>
> Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113.

> "If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the constitution when they vested in congress the authority to regulate commerce among the states."
>
> Hammer v. Dagenhart, 247 U. S. 272.

We respectfully submit that the judgment of the supreme court of Minnesota should be affirmed.

For the State:

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SUPREME COURT OF THE UNITED STATES.

No. 170.—October Term, 1926.

Hughes Bros. Timber Company, Petitioner, *vs.* State of Minnesota. | On Writ of Certiorari to the Supreme Court of Minnesota.

[November 23, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a special proceeding in the district court of Cook County, Minnesota, by the State, through the county treasurer, to collect taxes on personal property owned by the Hughes Bros. Timber Company. With the penalty and fees and costs, the amount sued for was $2,919.50. The amount claimed by items appeared in a delinquent list furnished by the treasurer to the sheriff of the county for collection for the year 1922. It included a tax upon 10,000 cords of pulp wood of the assessed value of $21,233. In its answer as amended, the Timber Company pleaded that the pulp wood was not subject to taxation in the State of Minnesota at the time it was assessed, May 1, 1922, but was at that time in actual transit in interstate commerce by continuous route from the State of Minnesota to the State of Michigan. This presents the only question in the case.

The issue was submitted, without a jury, to the district court which found that the wood was not being carried in interstate commerce. The result was a judgment against the Timber Company for $2,456.78, including a penalty. The case was appealed to the Supreme Court, which held that the judgment of the District Court was wrong in the penalty imposed, because the defendants had not been given opportunity to pay the correct amount of the taxes, but with this modification affirmed the judgment of the District Court. 163 Minn. 4. The case is here by certiorari granted October 12, 1925. 269 U. S. 542.

The Timber Company was a partnership, having its office headquarters at Hovland, Cook County, Minnesota. The Swamp River

flows through the county and empties into the Pigeon River. The latter forms the boundary between Cook County, Minnesota, and the Province of Ontario, Canada, and empties into Lake Superior. The Timber Company's pulp wood was cut and gathered at various places in the county, but was hauled to the Swamp River and piled up on the ice and on its banks at a point about two miles and a half above its discharge into the Pigeon River. In October, 1921, the Timber Company had made a contract with the Central Paper Company of Muskegon, Michigan. By that contract the Timber Company agreed to deliver to the Paper Company, over the rail of the Paper Company's vessels at the mouth of the Pigeon River, approximately 10,000 cords of spruce pulp wood. The Timber Company agreed to load the wood into them as promptly as possible after its arrival. The Paper Company was to give to the Timber Company three days' notice of the arrival of its vessels at the booms where the logs were held. The wood was to be scaled and measured by a representative of both parties when the first cargo was loaded, and also on arrival at Muskegon, Michigan, the measurement at Muskegon to be the basis for final settlement. The price per cord was to be $12. The Paper Company agreed to make progress estimates or provisional measurements during the months of January, February and March at river landings, and an advance of $3 per cord for all wood inspected and measured, its inspector to be properly assisted by the Timber Company. The title to the wood on which advances were made was to be in the name of the Paper Company and to be branded at the time of provisional inspection and measurement. The Paper Company agreed to advance the second 25 per cent. or $3 per cord when the wood was delivered in the Pigeon River booms and the balance, or $6 a cord, within five days after its delivery at Muskegon. Liability insurance was to be carried and paid by the Timber Company and cargo insurance was to be carried and paid for by the Paper Company. There was a warranty of title and freedom from all encumbrances by the Timber Company.

The hauling and placing of the logs on the ice and on the banks of the Swamp River were completed the latter part of March. When the ice broke, April 29, 1922, the drive of the logs began, those on the ice moved of themselves, and those on the banks were pushed in. The drive was conducted by the Timber Company's men. It had lasted eighteen days when the logs reached the Pigeon

River booms. By the latter part of July, all the logs had been shipped by vessels of the Paper Company on the lake to Muskegon.

We do not think it important, for purposes of this case to decide where the title to the timber was at the time the drive began. The Paper Company had an interest in the timber and so had the Timber Company. Although the point was at first made by the Timber Company that the logs were not taxable in the name of the Timber Company May 1, 1922, the day fixed as the tax day, that point is not pressed. The contract and the method of complying with it are all circumstances, however, throwing light on the question whether the transportation in interstate commerce began at the beginning of the drive when the ice broke up or at the point of loading on the lake.

The Timber Company was under contract to float the timber down from the place of piling on the Swamp River and deliver it as promptly as possible. The Paper Company by payment of $3.00 a ton had acquired a qualified ownership in the timber even before it was segregated and put to float. Had the Timber Company or some one claiming under it attempted to stop the drive after it had begun, and interfered with the passage of the timber down the Swamp or Pigeon River, it would have been a breach of the contract of sale. All this characterizes what was being done in the drive between the Swamp River entrepot and the mouth of the Pigeon River. That was the beginning or first leg of the interstate journey. The obligations of both parties accorded with that view. The change in the method of transportation by floating to carriage on a vessel did not affect the continuity of the interstate passage, if such a passage was intended by the parties and had begun, any more than did shipment by local railroad bills of lading from a point in a state to a port of the same state, for shipment by vessel to a foreign port, prevent its being interstate or foreign commerce. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101; *Texas, etc., R. R. Co.* v. *Sabine Tram Company,* 227 U. S. 111; *R. R. Commission* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336; *Philadelphia & Reading Ry. Co.* v. *Hancock,* 253 U. S. 284, 286; *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 170; *Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 70.

The case seems to us to come within the ruling of this Court in the case of *Champlain Company* v. *The Town of Brattleboro,* 260

U. S. 366. That was a tax case like this. There the owner had cut pulp wood in several towns in Vermont. The wood was placed upon the banks of the West River and its tributaries, to be floated down into the Connecticut River and thence to its destination at the mill of the owner in Hinsdale on the New Hampshire side of the river. Four thousand of the cords had been floated down the West River on the high water and reached a boom at the mouth of the West River, but it was thought not safe, in view of the high water, then to let the wood into the Connecticut. It was contended that the logs which were held in the boom at the mouth of the Connecticut were taxable there. We held otherwise; that the interstate journey of the logs had already begun when the boom was reached, that the boom was not a depot for the gathering of logs preparatory for the final journey, that it was a safety appliance in the course of the final journey, a harbor of refuge from danger to a shipment on its way; that it was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood in New Hampshire on the other side of the Connecticut River.

This Court distinguished the facts in that case from the facts in the main case discussed in *Coe* v. *Errol*, 116 U. S. 517, as they can be distinguished here. It is clear that the entrepot or depot for the interstate shipment of logs was in the Swamp River. The drive in the two rivers though under the direction of the Timber Company, was not gathering the logs for subsequent interstate shipment, it was the interstate movement itself. Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation by which the logs were carried from a place in one state to a place agreed upon in another.

The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another

state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the *Champlain Company* case. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the *Champlain* case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee who by the agreement of sale divided with him the responsibility for the continuous interstate transportation.

The judgment of the Supreme Court of Minnesota is reversed and remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court. U. S.